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A
R E A D I N G
UPON THE
STATUTE OF MURDER,
10 Hen. VII. chap. xxi.

IN THE COURSE OF WHICH,
The Doctrine "*That all are Principals
in High-Treason,*" is considered;

WITH SOME
O B S E R V A T I O N S
ON THE CASES OF
GEORGE ROBERT FITZGERALD, Esq.
AND JAMES FOY.

By JAMES WHITESTONE, Esq.

D U B L I N :
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READING

STATUTE OF MURDER

10th July 1891

IN THE COURT OF COMMONS

The Docket of the Prisoners

Rec. Feb. 18, 1891

WITH

OBSESSIVE

ON THE

GEORGE ROBERT STURGEON

AND JAMES TOY

BY JAMES WHITSTONE, Esq.

D. D. L. N.

PRINTED BY WILLIAM WHITSTONE

No. 33, SKINNER ROW

W. H. L. N.

T O
MICHAEL SMITH, Esq.

MEMBER OF PARLIAMENT FOR THE BOROUGH
OF RANDALSTOWN.

S I R,

THE favourable opinion you were pleased to express when I had the honour of communicating to you, in an undigested form, the principles advanced in the following pages, has made me thus bold in submitting them to public consideration.—Should they *now* be found worthy of YOUR PATRONAGE, I shall feel that my humble efforts have been directed to those objects you so emulously support: THE HAPPINESS AND INTERESTS OF SOCIETY.

I have the honour to be,

With the greatest Respect,

Your obliged and

devoted Servant,

James Whitestone.

Marlborough Street, }
February 2, 1787. }

MICHAEL SMITH

MINISTER OF PARISH AND THE PARISH
OF PARISH AND THE PARISH

THE following opinion was
expressed when I had the honor
of attending to the same and
I found the principles advanced in the
following pages, and made the following
in substance, that to public opinion
and to those who are in a position
of your patronage, I shall feel that
my humble efforts have been directed to
those objects you so emphatically support.
THE HARTNESS AND INTERESTS OF
THE PEOPLE.

I have the honor to be
and to be with the greatest respect,
Your obliged and faithful servant,
JAMES WHITFORD

James Whitford

INTRODUCTION.

THAT mild and benevolent principle, which under our constitution regulates the order of criminal process, and in the conviction of offenders, requires the highest degree of certainty as to their guilt, has perhaps contributed more than any other circumstance whatsoever, to preserve the liberties of the people from the encroachments of despotism, by affording to innocence a certain asylum, from the injustice of *arbitrary prosecution*.—The vigilance and jealousy of the people, are therefore wisely directed towards criminal proceedings, and their cautious observance, particularly of *state prosecutions*, while it affords them perhaps the best criterion whereby to judge of the true situation of their liberties,

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serves also to restrain the ministers of justice, (should they be so inclined,) from embracing an opportunity to destroy an *obnoxious* person, by convincing them THAT THE PEOPLE ARE NOT NEGLIGENT OF THEIR RIGHTS.

The late proceedings in the county of Mayo, upon the prosecution of George Robert Fitzgerald, Esq; and others, for the murder of Mr. McDonnell, and Mr. Hipson, have been the subject of general investigation, and of public criticism.—The rank of the unfortunate gentleman accused, the circumstances of the crime, and the attentive activity of the crown, in bringing the offenders to justice, created an universal anxiety for the event, and the eyes of the kingdom were turned impatiently towards Castlebar.—Ample atonement was made for the injuries done to the laws of society; but the issue of that business has not yielded that general satisfaction, which it were to be wished should

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should always accompany the attainment of the ends of justice.

The objections which arose upon the trial of Mr. Fitzgerald, and under the force of which, it was contended that he ought not to be put to answer until *some* principal offender should be first convicted, urged with great ability, and founded seemingly upon the principles of solid reasoning and sound sense, have made impressions which are not even now effaced, and which perhaps from not being thoroughly considered, have acquired the force of real conviction.

Having from the beginning conceived, that the objections could not by any possibility apply to the case of Mr. Fitzgerald, (being the procurer of a treason *which had actually been committed*;) I confess the tide of general opinion, and the sentiments of men far superior to me in experience and understanding, for a moment

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ment made me suspect the grounds upon which I had formed my determination, and caused me carefully to review and investigate those principles, upon which I had before built my opinion.—The result has been, that *at present* I have every reason to be confirmed in my former ideas on the subject.

A wish to communicate through the most public channel the substance of the few following sheets, and also my own *private opinion*, that the people upon questions of the present nature, have a just claim to every explanation that can be given, have induced me upon the present occasion, to forsake the shelter of an happy obscurity, and to expose myself to perhaps those just criticisms, to urge me to encounter which, though inexperience may, vanity has not at all contributed.

The Statute under which murder has
in

in Ireland been constituted the crime of high treason, and under which for almost three centuries past, the indictment for that offence has uniformly been laid as for treason, may even at this day be considered as a law which requires much explanation. It is evident, as well from some circumstances which appear among authentic records, as from several acts of parliament made relative to the trial of murders, that the statute has not been considered as satisfactory; and on some occasions it has been forgotten, either thro' * remissness or inattention.—† In the reign of Charles the First, in the second sessions

* A remarkable instance of this is to be found in the Stat. 10 Ch. 1, ch. 29, which speaks of *accessaries* to murder *traitorously* committed.—This was a statute made for the purpose of trying murders and felonies committed in different counties. It is copied from the Eng. stat. 2 Ed. ch. 24, in which statute, as murder is not high treason in England, the word *accessary* is sufficiently intelligible.

† Commons Journals, vol. 1. fo. 139, 140, 141, 142, 143.

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sessions of the parliament which was held in the year 1634, "It appears that leave was given to bring in a bill to *explain* the statute of murder, and that this bill received a first reading on the 24th November, 1634; on the twenty-seventh of November, it received a second reading; on the twenty-eighth of November it was ordered, That the bill entitled an act for the explaining of the statute of murder, made in the tenth year of Henry the Seventh, shall *not* be recommitted; it was also ordered, that it should be put to the question, whether the bill should be ingrossed or not, and upon the question being put, it was resolved, that the bill should not be put to the engrossing."—As I can find no traces of the debates in parliament at that period, I have not been able to form any idea as to the explanation intended; all that can now be ascertained is, that some members of the house thought the statute wanted explanation, but

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-but that to the majority it seemed most advisable, that it should remain as it was. It appears also by the preamble to the * statute, 9th Anne, ch. 4, that doubts had arisen whether an appeal could be brought in cases of murder, notwithstanding 10 H. 7. ch. 21. and the legislature thought it necessary to restore the right of appeal by a special act of parliament. Those instances are sufficient to shew, that the statute of murder has on some occasions been thought to want an explanation.—At present there seems to have arisen a greater necessity than before for some determination on the statute: Its enacting power has not only been questioned, (for it is doubted whether murder is made treason by the statute) but a question of great concernment in criminal law, has eventually arisen under the statute, viz. “Whether
“the procurer of a treason shall be tried
“before

* Irish Statutes.

“ before that he who committed the treason shall have been convicted, or whether according to Sir Michael Foster, the same rule which is observed upon the trials of accessorial offenders in felony, shall by parity of reason, be extended to those cases of felony, which are in themselves merely accessorial.”

In the following sheets I have endeavoured FIRST to shew, That it was the intention of the legislature to make the crime of murder high treason, and also that the statute does enact, (by sufficient express words for that purpose) that it shall be high treason.—In demonstrating that it was the intention of the legislature to make murder high treason, I have considered those probable grounds upon which that intention appears to have been formed.—The situation of Ireland at the time of making the statute, became a necessary and material subject of enquiry, and I must lament, that upon that subject, my abilities

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abilities and information have been greatly deficient. However, I trust, what I have advanced will at least be found authentic; indeed, having closely followed Sir John Davis, I hope I am not erroneous. I have been enabled upon one point, viz. the existence of the Brehon law, as practised in Ireland, in the manner related by Sir John Davis, to be I trust satisfactory; the proofs I have adduced are in their nature not to be controverted, and they establish a fact which before hung rather in uncertainty.

I have endeavoured to shew, that the statute contains sufficient express words to create the crime of treason, by considering "by what words have the several statutes since the 25 Ed. 3, created that crime," and by shewing that the statute under consideration, contains the very same words with some of those statutes; and I have also laboured to explain the efficiency of the statute,

statute, upon the solid ground of legal and rational argument.

I have SECONDLY considered those several incidents, which by necessary construction of law, are now inseparably united to the crime of murder.

THIRDLY, I have endeavoured to explain the rule as laid down by Hale and Foster, "That derivative offenders in treason, should in the intermediate steps towards their conviction, be considered in the nature of mere accessaries."—I have in treating on this subject, endeavoured to ascertain those cases to which the rule ought to apply, and discriminated between the cases of treasons advised and committed, and treasons advised but not carried into execution. I have also laboured to reconcile some seeming contradictions in Sir Matthew Hale, upon this point, and to shew that both he and Sir Michael Foster have been sometimes quoted,

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quoted as supporting principles, which I believe it never was their intention to countenance.

FOURTHLY, I have reviewed the case of Mr. Fitzgerald, and considered it under its special circumstances, as a case in which there was nothing whatsoever, to induce the court to apply that equitable rule contended for, supposing that consistent with the sound principles of law, it is a rule which ought to obtain in the cases of derivative offenders.

I have LASTLY considered the case of Foy.—It having been generally imagined that the decision in that case, militated with the determination of the court in the case of the King v. Fitzgerald, I have recited accurately the case as it really was, and demonstrated, I trust, that the decision of the court upon it, supports even to a nicety, the doctrine advanced by the determination in the case of Mr. Fitzgerald,

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Fitzgerald, viz. "That the procurer of a treason, which has been actually committed, may be tried before the person who really did the fact."

I have subjoined an Appendix, containing the indictments against Mr. Fitzgerald and against Foy, the plea of Foy, and the confessions of Andrew Craig and William Kelly; the one the person who actually committed the murder, and the other one of those unhappy wretches, who were aiding and assisting at the fact.

This is a general outline of the few following sheets. I am free to confess they abound with imperfections, but I trust they will not be found to contain any radical error. If, on this occasion, I may be said to expose my own weakness, I reflect with consolation, that I have afforded a new opportunity to call forth that spirit of liberality peculiar to our pro-

profession, which is the best patronage of the literary adventurer.

I shall only add, that it is not my principle to be obstinately attached to opinions that have not received the authoritative stamp of general acceptance. The fate of this little treatise will be a standard, by which my opinion of the doctrinal principles it advances, shall be regulated. As the offspring of my labours, I owe it much attachment, but it only can procure my *real esteem*, by being useful and beneficial to society; I shall therefore not repine at being refuted, if the doctrines I advance are injurious. Let me then recommend myself in the words of the learned Staunford, "ACCIPE SERENA FRONTE
 " HAS NOSTRAS LUCUBRATIUNCULAS,
 " QUIBUS SI QUID BONI INEST: DE-
 " CERPE AC FRUERE MECUM. SIN
 " MINUS PARA MELIORA NEC SUM INVI-
 " SURUS. EGO ENIM NIHIL ALIUD EX
 " HIS

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"HIS REPORTARE CUPIO, QUAM UT
"ERUDITOR QUISPIAM ISTIS PROVO-
"CATUS: DOCTIORA SCRIBAT PRO-
"MULGET QUE." Vale.

A READING

(3)

A

READING

UPON THE

STATUTE OF MURDER.

Statute 10 H. 7. ch. 21st,

* Anno 1495.

*" ITEM, Prayen the Commons, that for-
" asmuch as there hath been universal
A " murder*

* This statute was enacted in the year 1494, and not 1495, as appears from considering, that the accession of Henry the 7th, was on the 22nd Aug. 1485, so that November, 1494, must have been in the 10th year of his reign. Cox Hist. Irel. v. 1. 190.

" murder by malice prepenſed, uſed and
 " had in this land by divers perſons, con-
 " trary to the laws of Almighty God and
 " the King, without any fear or due pu-
 " niſhment had in that behalf, that it be
 " ordeyned, enacted, and eſtabliſhed by
 " authority of this preſent parliament,
 " and of the Lords Spiritual and Tempo-
 " ral, and Commons in the ſame aſſembled,
 " That if any perſon or perſons, whatſo-
 " ever eſtate, degree, or condition he or
 " they be of, from the feaſt of the Puri-
 " fication of our Lady, the tenth year of
 " the reign of our Sovereign Lord King
 " Henry the Seventh, forward, of malice
 " prepenſed, do ſlee or murder, or of the
 " ſaid malice, provoke, ſtir, or procure
 " any other perſon or perſons to ſlee or
 " murder any of the king's ſubjects with-
 " in this land of Ireland, be deemed trai-
 " tor attainted of haute treaſon, likewise
 " as

" as it should extend to our Sovereign
 " Lord's person, and to his Royal Majesty,
 " and that the chief Lords have their
 " escheats and forfeitures of all manner
 " lands, tenements, rents, services, with
 " their appurtenances; any act or ordi-
 " nances to the contrary hereof notwith-
 " standing"

THE particular law above recited, is
 the twenty-first chapter of that remark-
 able statute enacted in Ireland during the
 administration of Sir Edward Poynings.
 Appointed to the government of this king-
 dom for purposes the most interesting
 to the hopes of the then British Mon-
 arch, and at a period in which even the
 A 2 existence

existence of the English colonies was doubtful, he is to be viewed rather as the enterprising general, and active reformer, than the mere passive deputy of delegated Majesty. The adherents to the fortunes of the house of York in Ireland, had warmly abetted the cause of the impostor Warbeck; while Perkin, himself, by a judicious and opportune arrival, animated the steadfast favourers of his claim to the most decisive support of his interest, and by arguments deduced from facts in themselves credible; but at that peculiar juncture, incapable of being contradicted, confirmed the wavering and undetermined in the strictest fidelity to his person. * Espoused in Leinster by the most powerful leaders, and acknowledged in Munster by the declaration of its capital in his favour, he became superior in power to the then reigning government, and enjoyed unmolested,

* Sir John Davis's hist. col. 48.

molested, that acknowledged impunity which the * laws of Ireland at that time indiscriminately afforded.

The English colonists, to whom, save in a few instances, the benefits of the common law had been † solely extended, and amongst whom the enjoyment of its privileges, inclusively obtained, were diminished and reduced; the ‡ laws of England, which had been acknowledged in the several provinces, and used by the colonists universally, were now confined merely to the narrow district of the § pale, which,

* Vide 10 H. 7. ch. 3, by which it appears, that a prescription had been set up, under which all traitors, &c. coming into Ireland for any cause, were protected and succoured.

† Sir J. Davis, 77. Davis's reports, Tanistry case. Spencer's hist. Irel. 21. Ware's works, v. 2. 69.

‡ Sir J. Davis, 130. Spencer, 23.

§ Warner's hist. Irel. introd. p. 11. Sir J. Davis, 130.

which, within the limits of four considerable counties in the provinces of Leinster and Ulster, contained all the territorial acquisitions of the English in Ireland. Unable, offensively, to prevent the incursions of the Irish, the inhabitants of the Pale were reduced to the necessity of sustaining a defensive war, whilst its frontier, exposed to certain ravages, became * tributary to the enemy. In fine, all the English settlers (those who composed the inhabitants of the Pale, only excepted) having withdrawn their allegiance from the crown of England, and renounced all obedience to that law which they had imported, and which, upon their original establishment, had been confirmed and used by them; and having all embraced the Irish laws and customs, became the confederate supporters of Irish interest, and the most formidable

* Warner's Hist. Irel. introd. p. 11. Sir J. Davis
130.

midable adversaries to the prosperity of that power, whose standard they had deserted, and whose authority they had openly opposed in arms. That rooted enmity too, and insatiable appetite for cruelty, which generally actuates the deserter against the cause he has forsaken, seems powerfully to have operated upon the degenerate colonies; * implacable in their hatred, and unbounded in their vengeance, they rather sought the extermination and ruin, than the conquest and subjection of the English.

It was at this juncture, discouraging and inauspicious, that Sir Edward Poynings arrived the deputed Viceroy of Ireland. † The first efforts of his administration were directed against the rebellious abettors of the impostor, whom having routed and pursued as far as prudence

A 4 war-

* Hist. coll. 148. Spencer, 74.

† Sir J. Davis, 173.

warranted, and the suspicious complexion of the times permitted, he returned and called at Drogheda, that parliament in which the remarkable statute, the tenth of Henry the seventh, was enacted.

It would exceed the limits of my present purpose, to enter into an historical discussion of the various causes which probably occasioned the making of that statute, or to lead my reader through a minute detail of the several objects, which considered as a system of general reform, it with sound political judgment embraces; I rather wish to confine myself to the illustration of that particular chapter of the statute, which makes the offence of murder in Ireland, the *CRIMEN LÆSÆ MAJESTATIS*, and places the guilt of a person, who of malice premeditated, takes away the life of a subject, in equal degree in the scale of enormity, with that of him who has been guilty of "*High treason against the person of our Sovereign*

Lord

Lord and his Royal Majesty." I shall therefore engage in the history of this country, only as it relates to this particular subject, and pursue it no further, than as by demonstrating the nature and causes of the evil, it will best explain the necessity and reason of the law.

The reasons which induced the legislature at the particular time of making this law, to enact with such severity against the crime of murder, are manifestly set forth in the preamble of the law itself, by which it appears, "That universal murder by malice prepensed, was used and had in this land by divers persons, contrary to the laws of Almighty God and the King, without any fear or due punishment had in that behalf."—At this remote period, upon the grounds just enumerated, the necessity of interposing with the highest legal punishment the constitution knows, would to common understanding seem sufficiently explained ;

ed; but the studious mind, inquisitive after truth, and anxious to ascertain causes, not as they are made to appear, but as they really are, carrying its researches beyond the limits of mere intrinsic authority, explores the certainty of things, and decides on their reality according to their proof. In order, therefore, to enable my reader to form an accurate judgment to what extent and enormity, the crime of murder had arrived in this kingdom at the period of which we are treating, and also the necessity there was of opposing to it that violent remedy given by this law, I shall pursue the following inquiries as they seem naturally to arise from the consideration of the preamble last recited. First, I shall endeavour to shew from records, and the authority of cotemporary and other writers, that murder was become, particularly about the time of making this law, an universal crime. Secondly, I shall enquire into the causes why

why murder was become so general, Thirdly, explain the reason of the defect complained of, That this crime was committed without any fear or due punishment had in that behalf. And, fourthly, consider the policy and wisdom of the legislature, in making the offence so heinous, and ranking it among the highest crimes the laws acknowledge, or the constitution knows.

The * history of Ireland, from the time of the first invasion of the English, down to the thirty-ninth year of the reign of Elizabeth, is perhaps, for nothing more remarkable, than the manifold instances of private assassination it exhibits, and the relations of the numerous murders with which it abounds. During that period, Ireland seems completely to have fulfilled the † prophecy she was fated to sustain

* Vide Cox, Ware, Sir J. Davis, Spencer, &c. passim.

† Giraldus Cambrensis mentions, that it was foretold

sustain, and through scenes of slaughter the most atrocious and unatoned, to have, at length, arrived to a cessation from barbarity, and to have made some small advancement towards the blessings of civilization. * The several statutes, also, which were enacted in the Irish parliament previous to the tenth year of Henry the seventh, while they evince the existence of the crime, record its universal practice and unrestrained growth; and the most zealous † writer of that day,

reca-
foretold by the four chief prophets of Ireland, that the first ages in Ireland, after the invasion of the English, should be spent in crebris conflictibus, longoque certamine, et multis cadibus.

* The most remarkable of these, are 25 H. 6. ch. 4. ch. 5. 28 H. 6. ch. 1. ch. 3. 32 H. 6. ch. 2. 35. H. 6. ch. 3. 5. Ed. 4. ch. 1. The statutes of Kilkenny, which are not to be found in the printed state book; the preamble to the 4 ch. of 10. H. 7. which is also not to be found among the printed statutes; but which vid. post.

† This is one who styles himself Pandarus sine salus populi; he lived according to Ware, in the reigns of Edward

recapitulating the miseries under which the kingdom then suffered, and the horrors which were yet likely to overwhelm it,

Edward the fourth, Edward the fifth, Richard the third, Henry the seventh, and perhaps Henry the eighth. Vide Ware's Writers of Ireland, 90. He wrote his *salus populi*, in the reign of Henry the seventh, and certainly before the tenth year of that king's reign: this manuscript contains a most laboured description of the then state of Ireland, and after recapitulating the several causes of the general calamity which then prevailed, it proceeds to describe what, in the mind of the author, would be the most salutary means of reform. It may not be improper to observe, that this production of Pandarus, must certainly have been attended with some effect, as the legislature in the framing the 10 H. 7. seems evidently to have borrowed, at least, some hints from it. The antiquity of the author, his peculiar style of describing the calamitous state of Ireland, (consistent with the superstitious notions of that day) and the additional proof which he must be allowed to add to what I have already advanced, will, I trust, be the best apology I can make for laying the following extract from that manuscript before my readers. "There
 " is no land in this world, of so long continual war
 " within themselves, or of so great shedding of chris-
 " tian

it, laments, in the most expressive manner, the numerous murders and universal bloodshed, which destroyed the people and ruined the country. Nor will the general prevalence of this crime seem extraordinary, if we candidly investigate the circumstances which incited to, and the various motives which encouraged the practice of it.

* It was not until the third year of the reign

“ tian blood, nor of so great robbing, spoiling, and
 “ burning continually, as Ireland. The holy wo-
 “ man, Brigitta, used to enquire of her good angel,
 “ many questions and secrets, divine, and among all
 “ other, she enquired of what christian land was most
 “ souls damned. The angel shewed her a land in the
 “ west of the world; she enquired the cause why;
 “ the angel said, for there is most continual wars,
 “ root of hate and envy, and there christian folk die
 “ the most out of charity, without which souls cannot
 “ be saved. And then the angel shewed her the
 “ lapse of christian souls of that land, how they fell
 “ down into hell as thick as any hail shower.”

* Sir J. Davis's reports. Case of Tanistry, 39.
 Hist. Coll. 80 to 93. Ware's Antiq. Irel. 69.

reign of James the First, that the native Irish were admitted to the protection of the common law of England. Before that period, a * mere Irishman could not of right, claim the benefit of that law which, though professedly introduced for the government of the whole kingdom, was partially confined to the exercise of a few, and enjoyed only by the English settlers, and a few ennobled among the Irish: or by those who had purchased its advantages by charters of denization. † This cruel policy, while it demonstrated the views of the invaders to be exclusive, dominion naturally disseminated among the original inhabitants that stubborn aversion and rooted enmity, which are the usual opponents of haughty distinctions. The wretched native, who, in defence of his property, and in repelling the

The first Cause.

* Sir J. Davis's reports. Case of Tanistry, 39. Hist. Coll. 80 to 93. Ware's Antiq. Irel. 69.

† Ibid.

the incursions of the lordly invader, could not fail to transgress the constitutions of the newly imported law, which, while it deprived him of the enjoyment of his own municipal customs and national rights, gave to the usurpers the horrid privilege of freely disposing of his life and his inheritance as they pleased, could not but behold in the colonists the instruments of his unmerited destruction, which nature told him he might legally oppose by public violence or secret death. * Doomed by

* That the mere Irish were reputed by the English colonists as alien enemies, will satisfactorily appear from the following considerations. 1. They were obliged to purchase charters of denization. 2. They were not enabled, as Irishmen, to bring actions; and 3dly, it was not felony in an Englishman to kill them. Records are still extant, and copies of them are by Sir J. Davis carefully set out in his historical collections, which prove, incontestibly, the truth of what is here stated. Vid Hist. Col. ut supra. I shall present the curious reader with one of each kind of record above alluded to, referring him for greater certainty and more extensive information to the author last cited

Doomed by the sentence of a law which they could not understand, and which regarded them as alien enemies, to suf-

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cited. Copy of a patent of denization, granted the 13th of Edward the first. Edwardus Dei gratia, Rex Angliæ, Dom. Hiberniæ, Dux, Aquitanie, &c. Omnibus Ballivis et fidelibus suis in Hibernia, Salutem: Volentes Christohero filio Donaldi Hibernico, *gratiam facere specialem* concedimus pro nobis et hæredibus nostris, quod idem Christopherus hanc habeat libertatem, (viz.) Quod ipse de cetero in Hibernia utatur legibus Anglicanis, et prohibemus ne quisquam contra hanc concessionem nostram dictum Christopherum vexet in aliquo vel perturbet. In cujus rei testimonium, &c. Teste meipso apud Westm. 27 die Junii anno regni nostri 13. By which it appears, that this privilege of using the law of England, was ex speciali gratia, and that without this grant, the person to whom it was granted, might have been harrassed and destroyed by any person.—Copy of a record, shewing that the mere Irish were not enabled to bring actions. In the 29th of Edward the first, before the justices in oyer at Drogheda, Thomas le Botteler brought an action of detinue against Robert de Almain, for certain goods. The defendant pleaded, Quod non tenetur ei inde respondere, eo quod est Hibernicus et non de libero sanguine. Et prædictus Tho-

mas

fer the forfeiture of their birthright, and
undergo perpetual vassalage ; a suffer-
ing the more ignominious to the Irish,
as

mas dicit, quod Anglicus est, et hoc petit quod in-
quiratur per patriam, Ideo fiat inde Jurat, &c. Jurati
dicunt super sacramentum suum, quod prædictus
Thomas Anglicus est, ideo consideratum est quod
recuperet, &c. Archiv in Castro Dublin. Copy of
a record, shewing it was not felony in an Englishman
to kill an Irishman. At a goal delivery before John
Wogan, lord justice at Limerick, in 4th of Edward
the second, we find that Willielmus filius Rogeri rec-
tatus de morte Rogeri de Canteton felonice per ipsum
interfessi, venit et dicit, quod feloniam per interfec-
tionem prædictam committere non potuit, quia dicit
quod prædictus Rogerus Hibernicus est, et non de
libero sanguine ; dicit etiam quod prædictus Rogerus
fuit de cognomine de Ohederiscal, et non de cogno-
mine de Cantetons, et de hoc ponit se super patriam,
&c. Et Jurati dicunt super sacramentum suum, quod
prædictus Rogerus Hibernicus fuit et de cognomine
de Ohederiscal et pro Hibernico habebatur tota vita
sua. Ideo prædictus Willielmus quoad feloniam præ-
dictam quietus. Sed quia prædictus Rogerus Ohe-
deriscal fuit Hibernicus domini Regis, prædictus Wil-
lielmus recommittatur Gaolæ, quousque plegios in-
venerit de quinque maris solvendis Domino Regi pro
solutione

as it was the least reconcileable to their high spirit and national pride ; they became violent in their detestation towards

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the

soluzione prædicti Hibernici. Archiv in Castro Dublin placit: Coron. 4 Ed. 2.—But if the jury had found that the party slain was an Englishman, it had been adjudged felony. For it appears by a record of 29th Edward the first, Coram Waltero Lenfant et sociis suis justiciarils itinerantibus apud Drogheda in Comitatu Louth. Johannes Laurens indictat de morte Galfridi Dovedal venit et non dedit mortem prædictam : sed dicit quod prædict Galfridus fuit Hibernicus, et non de libero sanguine, et de bono et malo ponit se super patriam, &c. Et Jurat. dicunt super sacrum : suum quod prædict Galfridus Anglicus fuit, et ideo prædict Johannes culpabilis est de morte Galfridi prædict. Ideo suspendatur. Catalla 138. unde Hugo de Clinton Vicecomes respondit. Archiv Castro, Dublin. It is not, therefore, difficult even at this distant period, to ascertain the probable reasons why the petition of the Irish made to King Ed. 3, in the second year of his reign, praying that an act might pass in Ireland, to enable all the Irish to use the laws of England without purchasing particular charters of denization, was so unsuccessful. The compelling the Irish to purchase their denization, brought an immense sum annually into the exchequer,

the English adventurers, and seized with eagerness even the means of assassination, to extirpate a race whom they could not decisively

quer, and the not admitting them generally under the protection of the law of England, increased the number of forfeitures, and afforded colourable opportunities of extending the English territory in Ireland, and gratifying the demands of the numerous adventurers; all which would have been lost if the Irish petition had been complied with. It was, therefore, that Ed. 3, when he sent his writ into Ireland, directed to his chief justice, there to be certified by the opinion of the great lords at the next parliament, "Whether the prayer of the Irish could be granted," received for answer from them, "that the Irish could not be naturalized without evident damage both to themselves and the crown". And this they gave as their answer, because they feared, as Sir J. Davis says, "that if the Irish were received into the king's protection and made liegemen, and free subjects, the state of England would establish them in their possessions by grants from the crown, reduce their countries into counties, ennoble some of them, and enfranchise all, and make them amenable to the law, which would have abridged, and cut off a great part of that greatness which they had promised unto themselves." Hist. Coll. 116, 117.

decisively oppose in arms, nor court into reconciliation by the flattering terms of submission.

* The English lords, amongst whom, upon their success in Ireland, immense tracts of country had been distributed, jealous of their power, and envying each other their extensive sovereignty, inflamed their hatred into active quarrels, and caused an universal slaughter within their territories. Invested with the prerogative of making peace and war at pleasure, (a power committed to them for the purpose of totally extirpating the natives) they exercised their authority to the purpose of their own destruction, and under the permitted pretext of justifiable hostility, became the barbarous agents in general bloodshed. Nor was this privilege to destroy, confined to themselves

The second Cause.

B 3

only;

* Camden's Annales, anno 1210 et seq. Hist. Coll. 118 to 125.

only; each great lord, as he found his strength exhausted, and resources weakened, applied himself to the Irish enemy, who, as well from political motives, as the incentive of national antipathy, joined eagerly in the destruction, and ardently assisted in the general massacre.

These frequent conflicts among the great lords, as they naturally destroyed the English authority, proportionably augmented the power and strength of the Irish. * For no sooner was one party vanquished, than the Irish, who quietly beheld the contest, and patiently waited the event of it, became its masters, and possessing themselves of their territory, regained daily some part of the country from which they had been expelled, and of which the English colonies had usurped the dominion. The possessions of the English were thus continually intrenched on and diminished, when an event occa-

* Hist. Col. 123.

sioned by the reduced state in which England then was, and which the violent distractions that prevailed in Ireland successfully favoured, completed the destruction that before hung over the unfortunate colonies, and involved the kingdom in one general ruin, from which the repeated efforts of the wisest and most experienced governors, were not able to rescue it * The Scots, during the feeble administration of Edward the Second, had most successfully opposed the tyranny of Great Britain. Under the auspices of the most renowned hero among their kings, they regained their national superiority, † and by one decisive blow, restored the splendor of their crown, and established the independence of their country. Their leader, the adored Bruce, not contented with having freed his country from the English yoke, and having destroyed the

B 4 enemy's

* Hume's Hist. Eng. v. 2, in Edw. 2.

† The battle of Bannockburn, *ibid.*

enemy's kingdom on its northern frontier, meditated with a manly ambition, the conquest of her dependencies, and projected with that view the invasion of Ireland.

* About the tenth year of the reign of Edward the Second, an army under the command of Edward Bruce, the brother of Robert, having crossed over from Scotland, commenced hostilities in Ireland: an opportunity more favourable could not have been sought for; the English colonies, at war with each other, and assailed on every side by the Irish enemy, were unable to withstand the ravages of victorious troops, and the native inhabitants, stimulated by the recollection of the oppressions they had suffered, and unmindful of the imprudent advantages they afforded to the new invaders, hastily inlisted

* Sir John Davis states the invasion of the Scots to have taken place about the 10th year of the reign of Edw. 2, Hist. Col. 150; but Cox mentions it to have happened as if in the 8th year of his reign. Cox, v. 1. p. 93, vid. Spencer 27, 28.

inlisted themselves under the standard of Bruce, and united their arms against the common enemy. An ineffectual resistance was made by the colonists, and the invaders joined by additional forces from Scotland, under the command of Robert Bruce, over-ran the English Pale, possessed themselves of the maritime towns of Ulster, and remained the undisputed masters of the greatest part of the kingdom, before a force in any degree respectable could be opposed to their progress. Nor was it until the whole form of the English government in Ireland was deranged, and the colonies themselves had become disobedient and rebellious, that the Scots were thoroughly banished from the kingdom.—* It is in the consequences

* The defection of the English colonies, and the universal degeneracy which obtained amongst them, is attributed by Sir John Davis to this introduction of Coyn and Livery, which was occasioned, as he says, by the Scots invasion, in the manner above mentioned. Desmond having seized upon the lands of those
whom

consequences of this invasion, that we must whom his extortions and those of his followers banished from their possessions, found himself suddenly in the enjoyment of an immense territory, and an increase in his annual income of ten thousand pounds, from a scanty inheritance that yielded him before but one thousand marks yearly. It was impossible that Desmond could retain these possessions so illegally obtained, while he was amenable to the law of England; for that law would have restored the banished inhabitants to their lands, and have compelled the Earl to give them satisfaction for their losses. Obedience to the law of England was therefore, incompatible with his present greatness, and he chose rather to sacrifice his allegiance, than atone for the oppressions he had been guilty of. He therefore, rejected the English law and government, and acknowledged instead thereof, the Irish customs. In him revolted the greatest part of Munster. The remaining part of Munster, the greatest part of Leinster, all the province of Ulster, except the county of Louth, and all Connaught, caught the infection of Desmond's example, and renounced all obedience to the laws of England, governing themselves by the Irish customs and Brehon law. So that the only part of Ireland in which the English law was acknowledged and used, was in the four shires, viz. County of Dublin, Meath and Kildare, in Leinster, and Louth in Ulster.

Hist. Coll. 150 to 160.

must look for the causes of that calamity which afterwards overwhelmed the kingdom, and seemed to involve in it the extremes of calamity, and disaster. The army which had been raised for the reduction of the disaffected colonies, and for the purpose of opposing the Scotch and Irish enemy, was placed under the command of the Earl of Desmond. The treasury was totally unequal to the support of so numerous a body of forces, but the deputy was resolved to justify the expediency of keeping them on foot, by the critical situation in which the kingdom then was, which induced in some sort, a necessity for the measure. The expedient which was adopted to maintain them, proved the ruin of the country. Among those singular customs which the English on their first arrival found in use among the Irish, was the remarkable one, called * Bonaght, which was

The third
Cause.

* This was an Irish custom, as appears by Ware; it was an exaction imposed at the pleasure of the Lord,
for

an imposition at the pleasure of the Lord,
for the maintenance of his soldiers.* This

exaction,
for the maintenance of his horsemen, his foot called
Gallo Glasses, and his other light armed foot called
Kerns; and these soldiers, thus supported, were
sometimes, without distinction, called Bonaght, Bo-
naghts. Ware's Antiquities of Irel. v. 2. p. 74.
Warner introd. 97. Spencer 52. 3.

* I have followed Sir John Davis, in supposing
Coyn and Livery to be of English origin, grafted upon
the Irish custom of Bonaght. The etymology of these
words is variously accounted for, different authors
annexing to them various significations, as they derive
them from different roots. The curious reader will
find much interesting information on this point in
Davis, Cox, Spencer, Ware, and Warner. This
much is certain, that if Coyn and Livery was of Eng-
lish introduction, it existed soon after the arrival of
the English in Ireland, as we find it expressly men-
tioned in the fourth of the canons made at the Synod
held at Cashel, by Henry the second, shortly after
his arrival: "That all the church lands and pos-
sessions, throughout all Ireland, shall be free from
all secular exactions and impositions; and especially,
that no lords, earls or noblemen, nor their children
nor family, shall extort or take any *Coyn and Livery*,
or *Cosheries*,

exaction, under the name of Coyn and Livery, had been already practised partially by the English, and had been adopted by the great lords as the mode of maintaining those of the native Irish, whom, during their conflicts with each other, they had seduced into their alliance, and joined in their interest. The Earl of Desmond, unable to support his army by present pay, suffered the soldiers to take indiscriminately this exaction, from all off whom they could levy it, whilst the grievance was secretly countenanced by the wilful connivance of the Lord Justice. The desolation that ensued is scarcely credible; whole countries became depopulated

“ Cosheries, nor Cuddies, nor any other like custom,
 “ from thenceforth, in or upon any of the church
 “ lands or territories; and likewise that they, nor
 “ no other person, do henceforth exact out of the
 “ said church lands, old, wicked and detestable cus-
 “ toms of Coyn and Livery, which they were wont
 “ to extort upon such towns and villages of the
 “ churches, as were near and next bordering upon
 “ them.” Vid. Cambrensis, chap. 35.

populated of their peaceable proprietors, and were seized into the hands of the Earl himself, who distributed them among such of his followers as he found worthy to be his vassals. The catalogue of horrid crimes that followed the introduction of this extortion, is the best record of its baneful consequences. But in that catalogue, no crime stands so conspicuous as that of murder. For whilst the refusal of the unjust demand, urged under the authority of the commander, and sanctioned by the silent approbation of the Viceroy, afforded a barbarous pretext for instant homicide; the right to enforce the extortion, presented to the wild, and ungovernable soldier, the resistless opportunity of becoming the undisturbed master of the fortunes of his host, by an act on which his leader dared not frown, and which the law that he supported would but feebly punish. The landholders, exhausted by an extortion which they could not possibly endure, either

deserted

deserted their possessions and fled into England, or suffered death in defence of their families, and in opposing the exactions, as intolerable as they were cruel and illegal. All Munster, (save only the county of Tipperary) wasted by these means, fell into the hands of Desmond, who scorned, thus aggrandized, to acknowledge superior authority, or yield obedience to the crown of England.

* The English laws were, therefore, by him

• Sir John Davis remarks upon the English colonies, after they had rejected the laws of England, and had become degenerate, thus: "They became degenerate and metamorphosed, like Nebuchadnezzar, who, although he had the face of a man, had the heart of a beast: or like those who had drank of Circe's cup, and were turned into very beasts, and yet took such pleasure in their beastly manner of life, as they would not return to their shape of man again; insomuch as within less time than the age of a man, they had no marks or differences left amongst them, of that noble nation from which they were descended." Hist. Coll. 146.

him and his adherents rejected, and the Irish customs and Brehon law universally embraced. The government, in vain, denounced its vengeance against the malecontents, and opposed the severest punishments to their increasing crimes ; in vain was * Coyn and Livery made high

* By 28 H. 6, ch. 1. As this statute is very minute in describing the evils above recited, it will, I am confident, prove highly acceptable to my readers.

“ At the request of the commons, that when the
 “ marchours of the county of Dyvelin, and other
 “ marchours of sundry counties, and other men with-
 “ in the land of Ireland, do keep horsemen and foot-
 “ men, as well Irish as Englishmen, more than they
 “ can maintain upon their own costs, or upon their
 “ own tenants, and from day to other, do coynce
 “ them upon the poor husbands and tenants of the
 “ said land of Ireland, and do oppress and destroy
 “ them ; and namely, in time of harvest upon their
 “ cornes and meadows, with their horses, both day
 “ and night, and do pay nothing therefore, but many
 “ times do rob, spoil and kill the said tenants and husbands,
 “ as well by night as by day, and the captains of the
 “ same marchours, their wives and their pages, cer-
 “ tain times of the year, do gather and bring with
 “ them

high treason by the legislature, even the
C bold

" them the king's Irish enemies, both men and wo-
 " men, and English rebels, with their horsemen and
 " footmen, as well in time of war as in peace, to
 " night suppers called Cuddies, upon the said tenants
 " and husbands, and that they are the chief captains
 " of the said marchours, do lead and lodge them
 " upon one husband, one hundred men, horsemen
 " and footmen, some night, and upon one other te-
 " nant or husband, so many one other night, and so
 " every captain and their wives, pages and their
 " sons, as well as themselves, and every of them,
 " do lead and bring with them, so many of the said
 " Irish enemy and English rebels, with their horse-
 " men and footmen, upon the said husbands and te-
 " nants, and so they espie the secrecy of the said
 " land: and after that every of the said marchours,
 " their wives, pages and sons, have overgone the
 " said husbands and tenants of the said marches in the
 " form aforesaid, then they go to the captains afore-
 " said, and then the thieves of the said marchours do
 " knit and confeder together. And that the said
 " marchours thieves do steal in the English coun-
 " try, they do put out to them in the march, and in
 " time of war, the men of the said marchours, as
 " well horsemen as footmen, do guide the said Irish
 " enemies and their thieves into the English country,
 " and what tenant or husband will not be at their
 " truce

bold effort of Edward the 3d, to recall
the

“truce, they do burn, they do rob, spoil and kill,
“and furthermore, part the said land is wasted
“and destroyed. And if such rules be holden, not
“punished, it is like to be the utter destruction and
“undoing of said land. Wherefore the premises
“considered, it is ordained and agreed by the autho-
“rity of the said council, That no marchours, nor
“other men of the said counties, shall keep more
“men, horsemen or footmen, but that they shall an-
“swer for them and maintain them upon their own
“costs, or their own tenants. And what men they
“do keep, horsemen or footmen, the marchours of
“the county of Dyvelyn shall present their names to
“the sheriff, or the justices of peace of the said coun-
“ty, and they to present them to the mayor and
“bailiffs of the county of Dyvelyn, and in like case
“all marchours and other men of every county with-
“in Ireland, to the sheriffs or justices of peace of the
“counties, and they to present them to the mayor
“and bailiffs of the said cities, within the said coun-
“ties. And that the said marchours, nor any other
“man, shall any more use such coynees, suppers, cud-
“dies, nor shall take no pledges for them, nor none
“of their thieves or men, shall guide none of the
“king’s Irish enemies, in the form aforesaid. And
“what marchours or other men do contrary to the
“ordinances aforesaid, that they shall be adjudged
“as felons.” Irish statutes, vol. 1.

the obedience of the lords by the * resumption of those original grants made to them by his predecessors; a scheme founded on the most solid principles of speculative policy, and which promised the most fruitful success, was found to confirm their disaffection, and promote the most dangerous discontents. The period had arrived, when the charms of regularity and order, could no longer court the licentious chieftain, nor the awful powers of justice, terrify the daring efforts of ambition. The great lords saw that the arm of administration was weak, and that the greatness of the house of

C 2

Def-

* This general resumption by the king had almost ruined the kingdom; it begat a distinction between the English by birth and the English by blood; all the old English lords were offended, and the opposite parties held distinct parliaments, nor were the ill consequences which arose from this circumstance perfectly allayed until the king, in the twenty-sixth year of his reign, restored all the resumed estates. Cox 117. Hist. Coll. 125.

Desmond, established in despight of its laws, bid defiance to its authority; they felt the same ambition to gratify their pride and aggrandize their power. They revolted, and left the wretched remnant of English authority empaled within the confines of four inconsiderable counties, to enjoy amidst the terrors of assailment, the exercise of a law which had been rejected in every other part of the kingdom, and the possession of a sovereignty, which reached not beyond the limits of their pale.

The colonies thus reduced, became the object of general vengeance; but their most dangerous enemies, were those of the English, who were disaffected, and had become degenerate. Acquainted with the most accessible parts of the Pale, they effected by disguise in the day time, the most barbarous murders, while by night they atchieved a general massacre. The caution of the timid and the intrepidity

pidity of the more daring, was no security against their ingenious ravages and disguised attacks. The legislature, by severe penalties, was obliged to make the people cautious of their safety, • and interdicted a communication with any persons whatsoever, who were not apparelled as the law prescribed. In fine, there seemed no security to the wretched inhabitants of the contracted district, but universal vigilance, and unremitting attention.

It is in contemplating this æra of the history of Ireland, that the philosophic mind feels itself peculiarly interested, and looks forward with heightened anxiety to the progress and issue of this extraordinary revolution. History affords few instances, in which the destruction of regular

C 3

* Vide Stat. 5. Ed. 4. ch. 3, by which it is enacted, that the Irishmen dwelling in the counties of Meath, Dublin, Uriel, and Kildare, shall go apparelled like Englishmen, and wear their beards after the English manner.

gular governments appears to have been effected by a *sudden degeneracy of manners*. The habits of civilized society, and the obligations of allegiance, are seldom thrown off *at once*, and exchanged for the fordid customs of unpolished nations, or the unrestrained licence of distracted anarchy. The revolt of the English colonies become therefore, a subject of curious and interesting enquiry; and tho' agreeable to the limits which I have prescribed to myself, I cannot enter largely into an investigation of its progress, or its consequences; yet it will be matter of instructing information to consider, how these revolted colonies, by the adoption of particular Irish customs, contributed to increase the practice, and multiply the perpetration, of murders throughout the land.

The
fourth
Cause.

The laws by which, among the Irish, inheritable rights, and descendible property were regulated, having been cal-
culated

culated for the meridian of the early ages of society, were only qualified to support the mere existence of government, and to provide for those necessities to which human nature is most subject, as we find her most removed, from the true æra of civilization. The customs of Tanistry and Gavelkind, however innocent they may be esteemed, considered as the institutions of an infant state, regulating the right of succession to independent power, and distributing the patrimonial fortunes of the subject, amongst his kindred indiscriminately; must, when considered as used (which they really were by the colonies,) in opposition, to the laws of England, and as a system, established to favour public disaffection, and avowed licentiousness, be seen in their true point of view; the source of general disorder, and the common incentive to universal desolation. Each great lord was, in fact, a petty tyrant, and exercised within his seignory, an uncontrouled sovereignty;

armed with a power of making peace or war at pleasure, his dominions were extensive, in proportion as his sword was successful, and the limits of his territory usually formed the true standard of his fortunes in war. Power, estimated generally, according to the number of his followers, and abettors, was the best title by which he could hold, or acquire possessions. While tenures were therefore so unsettled and precarious, and while the preservation of a chieftry, depended much upon the ability and valour of its lord, the succession to them was regulated by that particular law, which among the Irish was known by the name of * Tanistry. If the necessary qualifications

* The laws by which, among the Irish, inheritances were regulated, were two fold. First, that of Tanistry, which was confined to the lords or chiefs of every sept or family; and secondly, Gavelkind, which regarded the inferior tenancies, or common lands and estates. The law of Tanistry was used until the fifth year

fications of supreme power, and numerous adherents, were not to be found in the

year of the reign of James the first, when by a solemn decision of the court of King's Bench, it was abolished, and declared by the judges to be a void custom. By this custom the inheritance was given "*Seniori et dignissimo viro, Sanguinis et Cognominis*" of the person who died seized. Seniority seems, however, to have been not always regarded, unless accompanied with superior talents and experience, and attended with a greater degree of power ; for the most worthy was he, who had the greatest number of followers, and was the person who, in exclusion of the senior, sometimes prevailed in the elections for Tanist. These elections, according to Ware, were usually had in the life-time of the Dynast, or chief of the Sept, so that upon his death, his successor was known, and assumed immediately the reins of government.—The reason of this custom is accounted for by Spencer, thus : " He says, it was specially for the defence and
 " maintenance of their lands in their posterity, and
 " for excluding all innovation or alienation thereof
 " unto strangers, and specially to the English. For
 " when their captain dieth, if the seignorie should
 " descend to his child, and he perhaps an infant,
 " another, peradventure, would step in between, or
 " thrust him out by strong hand, being then unable
 " to

the immediate * senior of the particular sept,

“to defend his right, or to withstand the force of a
 “foreigner; and therefore they do appoint the eldest
 “of the kin to have the seignorie, for that he com-
 “monly is a man of stronger years, and better expe-
 “rience to maintain the inheritance, and to defend
 “the country, either against the next bordering
 “lords, which use commonly to encroach one
 “upon another, as one is stronger; or against the
 “English. And to this end the Tanist is always
 “ready known, if it should happen the captain sud-
 “denly to die, or to be slain in battle, or to be out
 “of the country, to defend and keep it from all such
 “doubts and dangers. For which cause the Tanist
 “hath also a share of the country allotted unto him,
 “and certain cuttings and spendings upon all the in-
 “habitants under the lord.” Cox gives much the
 reasons as Spencer for the existence of this custom.
 All historians who mention this custom of Tanistry
 agree in this, that it was the parent of many mur-
 ders, and the occasion of civil wars in almost every
 family; and that by keeping the succession uncer-
 tain, and the possession precarious, it was the greatest
 obstacle to civilization and improvement, that could
 possibly be devised. Vid. Cox’s apparatus. Case of Ta-
 nistry. Davis’s Reports. Spencer, 13. Warn. Introd.
 Hist. Irel. 89. Ware’s Antiq. 73. Sir John Davis,
 135.

* Ibid.

sept, which was about to choose a successor, his election was postponed, and a younger brother frequently preferred. The access to power was neither difficult nor dangerous among people from whom, the artifices of ambition were easily concealed, and with whom, the standard of abilities was, the popularity of the * vulgar. † A spirit of profusion, and an extravagant hospitality, were sure to captivate the lower ranks; whilst the display of military skill, and of daring enterprize, added to a numerous train of followers, were irresistible arguments with the higher orders, in their determination of a successor, and in regulating the voice of election. Hence those innovations upon the regular order of succession; and *to this source may partly be attributed* that kindred slaughter, and unnatural treachery among relations,

* Ibid.

† Ibid.

which

which stain the annals and disgrace the history of those times. This exclusion from the succession, of him, whose claim was founded upon the principle of hereditary right, was generally attended with bloody consequences; whole septs have been frequently in the issue divided against themselves, and seignories wasted by intestine wars, have often been parcelled out as the distributive prey, of their surrounding neighbours.

The fifth
Cause.

The custom of Gavel-kind which obtained in Ireland, or rather that particular

This custom, by a resolution of all the judges, Hill. 3. Jacobi, was declared to be void. The custom, as set out by the judges in delivering their determination was, " That the caufinny or chief of
" the sept (who was commonly the most antient of
" the sept) made all the partitions by his own discretion. This caufinny, after the death of any
" tenant who had a competent portion of land, assembled all the sept, and having put all their possessions into hotchpot, made a new partition of
" the

ticular custom, by which all inferior tenancies were partible among males only,

“ the whole ; in which partition he did not assign
 “ to the sons of him who died, the portion which
 “ their father had, but he allotted to each person of
 “ the sept, according to his antiquity, a better or a
 “ greater portion.” This custom differed materially
 from that species of Gavel-kind which obtains in
 Kent ; for by the Kentish custom, the land is parti-
 ble among all the sons together ; whereas by the
 Irish Male-gavel it is divisible among the whole sept.
 The Kentish custom excluded bastards, the Irish
 custom admits as well the illegitimate, as the legiti-
 mate. The Kentish gavel allows wives dower, the
 Irish did not ; the Kentish custom suffers females to
 inherit for default of issue-male, the Irish totally ex-
 cludes females ; they differed in this also, that the
 Irish custom deprived the party of his freehold upon
 every new division, whereas by the English Gavel-
 kind no man’s freehold is divested during his life.
 Warner seems to have given the true reason, why
 the male-line by this custom was so obstinately pre-
 ferred in exclusion to the female, “ Because each
 “ country, not being able out of its own revenue to
 “ maintain an army that might defend itself, it was
 “ thus divided into small freeholds, that so each pos-
 “ sessor

only, was by introducing an uncertainty of estate, and frequently causing total changes

“feffor might be obliged to follow the chief lord to war for the defence of the country, upon their own charge, which was the service by which they held it; and the oftener a freehold was divided, the greater became the number of men in arms.”—Sir John Davis, and the several historians last mentioned, are very express upon the mischiefs occasioned by this custom of Gavel-kind. Vid. ut supra. The curious reader, for the etymology of the words Tanistry and Gavel-kind, may consult Sir James Ware, Warner, Spencer, &c. I cannot but express the peculiar satisfaction I have received in perusing the third number of *Collectanea de Rebus Hibernicis*. The learned author has placed the customs of Tanistry and Gavel-kind in a new, and I believe that just point of view, in which they were used by the ancient Irish. But those customs were, doubtless, not preserved in their original purity, or adhered to according to their primitive institution; the several records which remain of the manner in which the disaffected colonies, adopted, and used them, are sufficient proof that they had lost much of that spirit, which in the more early ages they perhaps were practised with. It was the abuse of these customs by the
revolted

changes in family property, peculiarly calculated to promote disorder, and establish * domestic rapine, extortion, and oppression †. The death of any one member of a particular sept, or family, was followed by a general consolidation of the several portions of land which

each revolted English, and by the Irish enemy with whom they were allied, that called forth the indignation of Sir John Davis, and compelled him, in terms so severe, to inveigh against the exercise of them; a warm advocate for the advancement of the laws of England in Ireland, he seems to have felt great impatience at every circumstance that impeded the establishment of an object which perhaps was that nearest to his heart; and however in the moments of zealous earnestness, he may have betrayed a severity of expression, ill suited to the dignity of his character, he certainly has not merited the epithet of ignorance, which has flown, I believe, inadvertently, from the pen of the learned gentleman, who, through kindred zeal, may perhaps have misconceived him.

* Ware's Antiq. 73.

† Davis's Reports, Custom de Gavel-kind, 498.

each member of that sept individually possessed; to these portions so united, was joined that of the deceased, the whole sept was then assembled by its caufinny or chief, and each person, from his hands, received a new possession, apportioned as circumstances might direct and govern, the discretion of the caufinny. The illegitimate male offspring of the deceased were intitled to their share, as well as the lawful issue, so that the family possessions, being continually distributed, upon each new division among more numerous claimants, became at length in the hands of individuals of the inferior class, an insufficient maintenance for their wants. Their necessities were therefore supplied by other means.

* An application by the honest efforts of industry, to trade or manufactures, would have stamped demerit on the character, sufficient to have excluded the party

* Coshery, † Cesse, ‡ Refection, and
 || Cuttings, each of which may be considered as co-operating to produce the most depraved manners, and eventually contributing to promote that dreadful of all human crimes—murder.

But

“arose among the men of power.” The mischiefs which arose from these customs, were so very alarming, that by the statutes of Kilkenny, they were made high treason. Vid. Sir John Davis, 143. Warner Introd. 96. Ware's Antiq. 72. Stanihurst de rebus gestis in Hibernia, lib. 1. p. 49.

* Coshery was an exaction of provisions, and lodging, for himself and his retinue, laid by the chief lord or dynast on his tenants, and others under his protection.

† Cesse was a tax of five marks on every plowland discretionally, levied under pretence of prerogative.

‡ Refection was a privilege the lord claimed of being entertained for one meal only.

|| Cuttings were a contribution raised towards paying the lord's debts, or a tax levied on some extraordinary occasion. Vid. Cox, Ware, Warner, Spencer, Davis, &c. ubi supra.

But the general impunity with which this crime was practised, seems most powerfully to have conduced towards its universal prevalence. The imposition of a pecuniary mulct, as a punishment for the commission of a crime, which under the law of England could only be atoned for by the death of the delinquent, cannot be supposed to have operated as a sufficient restraint upon those, who, under that law, expiated the offence by the severest punishment which the constitution allows. * It is a lamentable reflection, that fear should be found to govern the powers of human nature, in their several operations through social life, where the superior force of virtue has failed to persuade, and the allurements of moral good have been unable

The fifth Cause:

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* Beccaria, p. 6. Locke Hum. und. b. 2. ch. 21. Black. Com. vol. 1. p. 56... Si meliores sunt quos ducit amor, phures sunt quos corrigit timor, 1 Inst. 392.

to attract or influence. It will not therefore be wondered at, that this crime should, among the disaffected English colonies, have greatly increased, when it is considered, that murder among them was not punished, according to the law of England with death, but agreeable to the Irish * Brehon law, by
a pe-

* Of these laws few copies now remain, and even those that are to be met with are but fragments, and very imperfect. Indeed, after the very industrious, and persevering efforts of the Danes and English, totally to destroy every vestige of them, the escape of even those parts that remain, may justly be esteemed miraculous. The inhabitants of this country are under the highest obligations to Colonel Vallancey; there seems to be a zeal in the affection of this gentleman towards Ireland, that justly entitles him to the appellation of her real patriot; by his industry in explaining, and his success in bringing forth to public view, the substance of those laws, which have undergone the severest criticisms, and suffered the bitterest reproach, he has thrown a new light upon the history of the earlier ages of Ireland, more favourable, and certainly more authentic, than that of
any

a pecuniary mulct, called an Eric, imposed at the discretion of the Brehon or

D 3

Judge.

any preceding historian; his translation of those parts of the Brehon code which have come to his hands, while it perpetuates, in the most honourable manner, his own laborious perseverance, forms the only monument of the real character, which the first inhabitants of this kingdom ought to be considered under. Vid. *Collectanea de Rebus Hibernicis*, vol. 1. p. 657. vol. 2. p. 8. vol. 3. p. 72. The most perfect remains of this law are now, I am informed, in possession of our University, to whom they were liberally bestowed by Sir John Seabright. Great diversity of opinion has obtained, relative to the manner in which that part of the Brehon law that imposes the Eric in cases of homicide operated, many contending that it was the only atonement which the offender made, and was intended rather as some compensation to the friends of the party slain, than reparation for the injury done to the laws of society; whilst others (among whom the learned gentleman above alluded to is most conspicuous) contend that the murderer was punished with death, and that the Eric was imposed as a fine upon the particular society with which he lived, or upon his relations. A little attention to the changes which Ireland has suffered

at

Judge. It is at this defect, that the statute especially points, and it is with relation

at different periods, may perhaps reconcile this seeming contradiction. The fact is, that the law was used both ways. There can be no doubt from the examples which the learned gentleman himself affords, as well as from other respectable authority, that murder was at one period punished by the Irish with death, and that the Eric was imposed as a fine upon his kindred. That period was, however, immediately antecedent to the arrival of the English, or perhaps it existed for some inconsiderable time after the invasion of that nation. The manuscript which Warner had by him when he wrote his history of Ireland, gives an account of the Eric, which exactly corresponds with the foregoing. It says, " That if
 " any man committing murder was not immediately
 " taken and executed in hot blood, it was customary
 " for the Brehon to impose an Eric or fine upon his
 " nearest kindred ; which was part of it paid to the
 " relations of the person murdered, and the other part
 " to the chief lord ; and the reason of this was, because, if any murderer could escape into another
 " territory, he was protected ; and it not being lawful to draw the blood of his kindred for him, it
 " was thought fit to impose a fine upon them, as a
 " satisfaction to the lord for the loss of his vassal, and
 " to

lation to this mode of punishment, that
the statute must be understood, when it
D 4 says,

“ to the friends of the party murdered ; that thereby
“ the offenders might in some sort be punished in the
“ the persons, or at least the properties of their dear-
“ est kindred.” Warner’s introd. 92. By stat. 10,
H. 7. ch. 11. It is made felony to impose this fine
upon the relations of the persons murdered. “Prayen
“ the Commons of this land of Ireland, That where
“ it is used by divers of the said land for the death of
“ their friends or kinsmen, to bren, slay, or robbe,
“ as many as bearest the name of him that is slain,
“ whereas his next kin should sue appeal of death in
“ the king’s court for that murder, and by reason of
“ such damnable ways, will compel all such persons as
“ been of the same name that he is of, that was
“ causer of that murder, howbeit, that he was never
“ of his blood to pay assant, that is to say, to depart
“ with the most part of their goods by way of amends.
“ Wherefore it is ordained and enacted, and establish-
“ ed by authority of this present parliament, That if
“ any person or persons, from this time forward, doe
“ challenge or cause any of the king’s subjects to pay
“ any assant, or have amends otherwise than the
“ king’s law will in that behalf, that he or they that
“ shall so offend, and thereof to be convicted, have
“ judgment de vie et de member.” Nota, there is an
evident

says, "*That there hath been universal murder by malice prepensed, used and had in*
this

" evident mistake in the wording of this act ;—instead
 " of the words, "*as beareth the name of him that is*
 "*slain,*" it should have been *as beareth the name of*
him that is the slayer. Vid. Ware's Antiq. 75.—
 This mode of laying a fine upon the relations of the
 murderer, if he could not be taken, was somewhat
 analogous to that introduced by Canute in England,
 which is thus described by Bracton, lib. 3 de Corona,
 fo. 134 b. ch. 15. "*Causa vero inventionis murthero-*
 "*rum talis fuit, quod in diebus Canuti regis Dano-*
 "*rum, qui post Angliam acquisitam et pacificatam, ro-*
 "*gatu Baronum Anglorum remisit ad Daciam exer-*
 "*citum suum et ipsi barones Angliæ erga ipsum*
 "*regem Canutum fidejussores extiterunt, quod quot-*
 "*quot rex in Anglia secum retineret firmam pacem,*
 "*per omnia haberent, ita quod si quis Anglorum ali-*
 "*quem hominum quos rex secum adduxit interficeret,*
 "*si se super hoc defendere non possit judicio Dei, fili-*
 "*cet aqua vel ferro, fieret de eo justitia, si autem au-*
 "*fugeret et capi non posset, solverentur pro eo 66*
 "*marcæ, et colligebantur in villa, ubi quis esset inter-*
 "*fectus, et ideo quia interfectorem non habuerunt,*
 "*et si in tali villa, pro paupertate colligi non possent,*
 "*colligerentur in hundredo in thesaura regis depo-*
 "*nendæ."* This mulct or fine was called *murdum.*

But

*" this land by divers persons contrary to the
 " laws of Almighty God and the King, WITH-
 " OUT*

But it is certain, that shortly after the arrival of the English, the Eric was made the compensation for murder ; it was the price, for which the friends of the murdered person bartered his blood ; nor was its adoption in this sense last mentioned, confined to the mere Irish, and revolted English.—The Viceroy, himself, partook of these wages of murder.—It was decreed by one of the canons made in the synod held at Cashel by Henry the Second, That when Erick or *composition* is made among the lay people for any murder, That no person of the clergy (though he be kin to any of the parties) shall contribute any thing thereto, but as they be free from the murder, so shall they be free from payment of money for any such Erick or release for the same. Giral. Camb. ch. 35, It appears also by the record before cited, page 18, that the murder of an Irishman by an Englishman was punished agreeable to the Irish Brehon laws, by a fine only ; for the record runs, "*Sed quia prædictus
 " Rogerus Ohederiscus fuit Hibernicus Domini Regis,
 " prædictus Willielmus recommitatur Gaolæ, quous-
 " que plegios invenerit de quinque marcis solvendis
 " domino regi pro solutione prædicti Hibernici.*" The following record shews in a still clearer, and more decisive point of view, the truth of the position I have
 advanced.

“OUT ANY FEAR OR DUE PUNISHMENT
 “HAD IN THAT BEHALF.”—In fact, the
 intro-

advanced.—It contains the petition of the people of Ireland to the king, for a redress of grievances, and states, “Quod cum in terra illa lex talis habeatur, “videlicet, quod Anglicus de morte Anglici, latro-
 “cinio, incendio, vel depredatione cujuscumque
 “rei valorem duodecim denar : et unius ob : attin-
 “gentis, vel eam excedentis, convictus, ultimum
 “supplicium subire debeat, Hibernicus vero de morte
 “Anglici, vel incendio convictus, idem patiatu-
 “diciu ; sed Hibernicus de latrocinio vel depreda-
 “tione cuicumque Anglico vel Hibernico facto, con-
 “victus, ad voluntatem sui judicis relinqui solet, re-
 “dimendus, vel ultimo supplicio condemnandus, per
 “quam quidem legem, dum in terra prædicta legi-
 “time fuit observata, crevit populus Anglicanus
 “ibidem, et multiplicabatur, possessionesque et ter-
 “minos sanctæ matris Ecclesiæ dilatavit ibidem ; post-
 “quam vero justiciarii partium illarum, auctoritatem
 “sibi sumentes rectatos de felonis pro modico ali-
 “quando pro nihilo redimi fecerunt, et permittebant,
 “videlicet capiendo pro morte Anglici felonice inter-
 “fecti, depredatione, et latrocinio, centum libras,
 “vel centum, quadraginta, vel viginti solidos, cujus
 “prætextu maleficis sub spe hujusmodi facilitatis
 “veniæ delinquendi audaciam fumentibus, homici-
 “dia,

introduction of this mode of punishing
murder according to the Brehon law,
while

“ dia, depredationes, incendia, et alias felonias per-
“ petrantibus, cessarunt in plerisque locis agri cul-
“ turæ, et merchandisæ plus solito deciderunt, sic
“ ipsa terra per felones Anglicos et Hibernicos qui sub
“ spe hujusmodi veniæ ; ac etiam pro eo quod fide-
“ les hujusmodi felones indictare, nec de eis in judicium
“ verum dicere non audent, ne pro suo veredicto per
“ eosdem felones pro hujusmodi redemptione dimif-
“ sos, occidantur seu distruantur, homicidia, incen-
“ dia, latrocinia, et depredationes committere non
“ verebantur, nec adhuc verentur, in immensum
“ est distructa, populusque sub pace et lege nostra
“ vivere cupiens, loca in quibus morari solebat va-
“ cuans, ea felonibus et hujusmodi mala perpetranti-
“ bus, ut est dictum, reliquit ; per quod Ecclesia
“ sancta, quæ observata pace et lege prædicta, suos
“ limites longe lateque diffuderat, rogante hujusmodi
“ malicia quasi penitus est destructa.” They there-
fore prayed relief. Vid. Prynne on the fourth In-
stitute, p. 262. This petition was preferred about
the tenth year of Edw. the Second. There is a still
more satisfactory record, which places the truth of
what I have asserted, (viz. that the murderer com-
pounded his offence by fine only,) beyond the possibility
of contradiction.—After that the different Irish chief-
tains

while it restored the offender to the uncontrouled exercise of his former liberty,

kins and rebellious English lords, had made their submissions to Sir Anthony St. Leger, the lord deputy, in the 33d. Henry Eighth ; and after that several laws had been made in the parliament called by the said deputy, for the better government of the kingdom, it was found that those laws could not possibly be put in force in certain parts of the country, because as is expressed, the inhabitants "*Non-dum sic sapiunt leges et Jura, ut secundum eam jam immediate vivere et regi possint.*"—The lord deputy and council, therefore, framed certain rules and orders for the present government of those particular counties, among which I find the two following, viz. "That a general peace be proclaimed throughout Munster, and afterwards he that commits murder or robbery shall be fined forty pounds, half to the king and half to the lord of the fee." "That petty larceny shall be punished by a fine of three pounds six shillings and eight pence, whereof forty shillings shall be paid to the captain or lord of the country, and twenty shillings to the taniist, *si non est particeps criminis,* and six shillings and eight pence to the informer." These rules were made public by proclamation the twentieth of July, 1542. Vid. Council Book of Ireland,

berty, erected a general impunity for
the

land, 33. H. 8. Cox, 271. Sir John Davis, 193. By the above it appears, that the legislature wisely avoided enforcing immediately those laws, which were ill suited to the genius of the people, and prudently modified the old law by which they were governed, to answer the present ends of regulation, until they should become better qualified to receive other laws more agreeable to the standard of the English Constitution. We cannot therefore be surprized, that Sir John Davis, and other historians, should be so severe in their observations upon this particular custom of the Irish, as it was made use of in those times of which they treat, precisely as is stated in the above petition, and was productive of the most fatal consequences to the country.—A wish to place the subject in a clear point of view has made me thus diffuse; I trust the obvious necessity of it will plead my excuse. I was desirous also of rescuing Sir John Davis (who, as to the subject he has treated of, is the very best historian of Ireland,) from the very heavy imputation of ignorance and partiality thrown out against him in the first volume of the *Collectanea de Rebus Hibernicis*, p. 401 et seq. The reader may consult at his leisure upon the subject of the Brehon law, the several numbers of the *Collectanea*, Ware's *Antiq.* 70. Ware's *Writers*, 2. Sir John Davis, 134. Spencer, 7. Nicholson's *Hist. Irish*, lib. 133. 4. Warner's *Hist. Irel.* Introd. 87. cum multis aliis.

the crime; * the friends or relations of the person murdered, unprotected from the violence of the murderer, should he escape, chose rather to suffer the death of their kinsman to remain unavenged, than by a fruitless prosecution to expose themselves to the perils of assassination, or the vindictive malice of a criminal, whose bloody purposes the laws would not prevent, and against whose meditated revenge the Constitution afforded no security. The fine itself, when imposed, seems rather to have been proportioned to the condition of the offender, than to have respected the enormity of the offence; the interest which the dispenser of this law had in the fine when levied, seems to have rather made the ability of the offender to pay, than the degree of his guilt, the true standard for the measure of the Fine.

The
 * Vid. ante, p. 58, the record of the petition to King Edward the Second from Ireland, relative to the mischiefs which this mode of punishing murder caused.

† The eleventh part of whatever should be adjudged the price of expiation, was to the Brehon of more important concern, than that atonement should be made for crimes, or that the breaches which the laws sustained, should be repaired at the expence of the guilty. The effect of the punishment, when perhaps it might have been operative, was therefore lost through the interest which the judge had in imposing it; and while the discretion which he possessed of proportioning the fine, afforded him the fairest opportunities of consulting his own interest in preference to that of the state, it armed him also with the most dangerous power against the Constitution,—a power of inflicting arbitrary punishment.

The parliament of Ireland, in devising an adequate remedy for this inveterate evil,

† The Brehon's salary was the eleventh part of the fine imposed. Vid. Ware's Antiq. p. 70.

evil, promoted by so many powerful causes, and defended as it was by that very law which professed to be its punisher, had not only to combat with national antipathy, lordly jealousies, general disaffection, and the obstinate habits which barbarous customs had confirmed; but had also to oppose its authority to the execution of a native law, which in exclusion of the common law of England (by which murder was punished with death) had universally prevailed, and by which the known and settled maxims of the English law were set aside, to favour vague prescriptions, and pretended rights. It saw the felony compounded, and the punishment of death commuted, for pecuniary contribution. It beheld the crime increasing amidst the idle terrors of unoperative laws, and † fruitless expedients to soften or

† The reader will find in Prynne, on the fourth Instit. p. 262, 267, 271, 290, 294, 300, 306, many writes

or prevent it. * In vain were the people forbidden, under the severest penalties,
 E from

writs directed at different times to the lord justices, and deputies of Ireland, in which various orders are contained relative to the expediency of abolishing, or modifying this law of the Eric, as the circumstances of the times required.

* The March or Brehon law was declared to be treason by the statutes of Kilkenny, ch. 4. the preamble to which recites, " That forasmuch as the
 " diversity of divers governments in one land, doth
 " make diversity of liganice and debates between the
 " people, it is accorded and established, that here-
 " after no Englishman have debate with another
 " Englishman, but according to the course of the
 " common law; and that no Englishmen be ruled
 " in the definition of their debates by the March law,
 " or the Brehon law, which by reason ought not
 " to be named a law, but an evil custom; but that
 " they be ruled as right is, by the common law of
 " the land, as the lieges of our sovereign lord the
 " king; and if any doth the contrary, and there-
 " of be attainted, that he be taken and imprisoned,
 " and judged as traitor." These statutes of Kilkenny are not now to be found, they having been lost out of the rolls many years ago. They were enacted
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from practising the March law, or deciding their controversies by the sentence of
of

in the fortieth year of Edward the Third, during the administration of Lionel Duke of Clarence, anno 1367. The substance of these statutes is recited by Davis and Cox, and the latter mentions, " that these
" statutes are to be found in the library at Lambeth,
" liber D. that they are written in French, and that
" the lords and commons sat together in making of
" them." A learned friend of mine, who has a catalogue of all the manuscripts in Lambeth library, has informed me, that the statutes above mentioned are not among them. It appears, that these statutes had a great effect in reducing the degenerate colonies to obedience, and by the Irish stat. 10 H. 7. ch. 8. by which those statutes are confirmed, we are told,
" That while the said statutes were set in use and
" duely executed, Ireland continued in prosperitie
" and honour, and sith the time that they were not
" executed, the subjects of that land rebelled, and
" digressed from their allegiance, and the land did
" fall to ruine and desolation." These statutes were also confirmed in a parliament held at Dublin, 5 H. 4. and also in another parliament held there, 9 H. 4. Vid. Sir John Davis, 101, 170, 1. 2. Cox, 127. Prynn, 312. Nichol. Hist. lib. 135. It is a lament-
able

of Irish customs; in vain was the Brehon law declared a lewd custom, and its use prohibited under the penalties of treason. The different ordinances made in England, by which the several Viceroy's were invested with the fullest discretionary powers, to prevent or redress this evil, proved all ineffectual. In fine, the Legislature saw that the offence had become so inveterate, that nothing but the most rigorous severity, could with any prospect of success be opposed to it;—to have declared murder to be a felony, would only have revived a law which already was found ineffectual, it became therefore necessary to class it among crimes of greater enormity, and the Legislature accordingly has made it high treason*, as against the King's person,

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in

able reflection, that our statute book should be so imperfect, as to want several statutes in many of the different kings reigns; even the Irish Magna Charta is not among the number of our statutes.

* Vid. post. p. 71 et seq.

in the perpetrator and procurer, saving however to the chief lords their $\dagger$ escheats and forfeitures.

Having endeavoured to shew, that the crime of murder had become universal in Ireland, and having inquired into its causes, and laboured to explain how it came to pass, "*that there was no fear or due punishment had in that behalf;*" I trust that the wisdom of the Legislature in framing the statute under consideration,

$\dagger$ This saving of the escheat to the lords seems to have been dictated by sound policy;—it gave them an interest in bringing the offender to justice, by giving them a compensation for the loss of their vassal; a strong inducement to prevent their screening the criminal from the laws, within their territories, a custom very prevalent and almost universal in those times; indeed the forfeitures and corruption of blood which ensued upon an attainder for high treason, were certainly well calculated to counteract that practice of alienating property in order to enter into rebellion, or commit other crimes with more impunity, which we find universally prevailed among both the English and Irish at this period.

tion, will sufficiently appear, and that the necessity of the law, will be thought a full justification of its severity.—I have been thus historically diffuse upon the foregoing part of the subject, because I conceived that those enquiries which have been pursued, formed the best key to the intention of the legislature, in framing the statute, and indeed to the statute itself, and were likely in the end to justify that uniform usage, which has hitherto so long prevailed in this country, in trials for murder, and to *establish* such a construction of the law in future, as that no contrariety of opinion thereon, may hereafter be entertained.

The objections which have been raised against the statute, considered as a law which changes the nature of the crime of murder, and which upon a *late occasion* were relied on as principles which in cases of high treason, should regulate the trial and govern the relative guilt of offenders,

become the next, (and indeed the most important) subject of consideration. I shall, therefore, first examine "how far the crime of murder, as it stood at common law, had been altered by the 10 H. 7. ch. 21 ? and secondly, consider the doctrine of accomplices in high treason, applying it to those cases which are more immediately the subject of general enquiry, and investigating how far the attainder of George Robert Fitzgerald, Esq; was had, consistent with the known rules of law, which have always governed in cases of high treason,

"It hath been said, that it never could be the intention of the legislature to make the offence of murder in Ireland, high treason ; and it has been seriously insisted on, that if it even was the intention, the enacting clause of the statute is insufficient for that purpose ; for the construction contended for, is, that the crime of murder remains as it was before

at common law, viz. a Felony, and that the statute only superadds the punishment of treason.—The enacting clause in the statute ordains, “ That if any person or persons, whatsoever estate, degree or condition he or they be of, from the feast of the Purification of our Lady, the tenth year of the reign of our sovereign Lord King Henry the seventh, forward, of malice prepensed, do flee or murder, or of the said malice, provoke, stir, or procure any other person or persons to flee or murder any of the king’s subjects within this land of Ireland, be deemed traitor attainted of haute treason, likewise as it should extend to our said Sovereign Lord’s person, and to his Royal Majesty, and that the chief Lords have their escheats and forfeitures of all manner lands, tenements, rents, services, with their appurtenances; any act or ordinances to the contrary hereof notwithstanding.”—It would, perhaps, be a sufficient answer to the objection, to reply

in the words of the statute, that the offender is made a "*traitor attainted of high treason as if against the king's person,*" and to remark, that the punishment is *incidental* to the party's being a traitor, and is only given *impliedly* by the statute: for it is observable, that the statute, as to the punishment is silent, it does not create the offence by the same words with some statutes of treason, viz. "*shall suffer the pains and penalties of treason,*" or, "*shall suffer as in cases of high treason;*" so that in reality, the question, whether a statute enacting, that an offender shall suffer as in cases of high treason, makes the crime for which the offender shall so suffer, high treason? cannot arise upon the Irish statute of murder; the question

* Thus the 5 Eliz. ch. 1. sect. 11, makes refusing to take the oaths prescribed by that act, a second time, high treason, by those words above recited.—In like manner, the 3 and 4 Anne, ch. 14, makes persons sending arms to France during the war, guilty of high treason.

question rather being, (if it really can be a question) whether a statute which enacts, that a particular person who commits a certain offence, shall be deemed traitor attainted of high treason, makes also the offence itself, *impliedly*, high treason, for the commission of which he shall be so adjudged as a traitor.—I wish, however, to treat the objections seriously; and in order thereto, I shall enquire, First, by what express words in a statute, is the crime of *murder* created? Secondly, whether the 10th H. 7. ch. 21, has sufficient express words? Thirdly, what has been the usage under the statute? Fourthly, what was the intention of the legislature, as collected from the words of the statute itself? and Fifthly, endeavour to collect what has been the opinion of the lawyers of Ireland relative to this statute?—Under our happy constitution, where the nature of punishment is determinate and fixed, and * certain known punish-

* Those instances in which the courts are enabled
to

punishments are allotted to the several species of offences, an offence may be well enough ascertained, by describing its particular punishment. Thus, when we speak of the offence, which is punished by hanging the offender, we usually mean that offence which under our law is known by the name of felony without benefit of clergy; so when we say, that a person has been attainted, that his blood is corrupted, and that he has forfeited all his lands to the crown, we mean that he has been guilty of high treason,

to impose a discretionary fine, or imprisonment, may, at first sight, seem an exception to this observation; however, it will be found, that even in these cases, the *nature* of the punishment is fixed and determinate. The bill of rights, 1 Wm. and Mar. sess. 2, ch. 2, after reciting that excessive bail had been required, and excessive fines imposed, and illegal and cruel punishments inflicted, "ordained, that excessive bail "ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." So that the discretion of the courts is regulated by law. Vid. 4 Blackst. com. ch. 29, 372.

treason. Thus * crimes and their punishments become correlative ideas, and are expressed by terms reciprocally relative, as felony and treason are expressed by the specific punishments which are assigned to each. It is in this manner we must understand the several statutes, which, from the 25th Ed. 3, to the present period, create the crime of high treason.—The several statutes by which treasons have been created, from the 25th Ed.

First.

* This is sufficiently confirmed by considering what words in a statute will make an offence felony. It appears, that not only those crimes which are made felonies in express words, but also all those which are decreed to have, or undergo judgment of life and member by any statute, become felonies thereby, whether the word felony were omitted or mentioned. Vid. Co. Lit. 391, where the words, "*Eyt judgment de vie et member,*" or, *subeat iudicium vitæ vel membrorum*, without other words, create a felony. Vid. also S. P. 2 Inst. 434 Westm. second. 3 Inst. ch. 29. p. 91. Br. tit. Corone pl. 204, fo. 182. Case Searle v. Williams, Hob. rep. 293. 1 Hal. P. C. 627, 641, 703. 1 Hawk. P. C. ch. 40. fo. 107.

Ed. 3, to the 13 Car. 2, ch. 1, have been all carefully revised and commented upon by Sir Matthew Hale. I shall enquire, therefore, by what express words have those statutes so revised by Sir Matthew Hale, created the offence of high treason?—* Some statutes enact, that the offence generally shall be high treason;—† Some that the offender shall suffer as a traitor; ‡ Others that the offender shall be adjudged traitor; ¶ Some statutes declare,

* 25 Ed. 3 ft. 5. ch. 2. 3 H. 6. ch. 17. 8 H. 6. ch. 6. 4 H. 7. ch. 18. 22 H. 8. ch. 9. 27 H. 8. ch. 2. 28 H. 8. ch. 18. 32 H. 8. ch. 25. 35 H. 8. ch. 3. § 2. 3 and 4 Ed. 6, ch. 5. 1 and 2 Ph. and Mar. ch. 10. 1 Eliz. ch. 5. 13 Eliz. ch. 1. 14 Eliz. ch. 1. § 2. 3 and 4 Wm. and Mar. ch. 13. 5 Eliz. ch. 11. 7 Ann, ch. 4.

† 5 R. 2. ch. 6. 5 Eliz. ch. 1. § 11. 23 Eliz. ch. 1. § 2. 3 and 4 Anne, ch. 14.

‡ 21 R. 2. ch. 2, 3, 4, 20. 1 and 2 Ph. and Mar. ch. 9. Irish stat. 18 H. 6. ch. 3. 10 H. 7. ch. 3. § 13. ch. 21.

¶ 3 H. 5. ft. 2. ch. 6. 25 H. 8. ch. 22. pl. 8. 28 H. 8.

clare, that the offence shall be treason, that the offender shall be a traitor, and that he shall suffer the punishment of treason : * Others make the offence treason, and enact, that the offender shall suffer as a traitor : † Others that the offender shall be a traitor, and shall suffer as in high treason. Since the reign of Charles 2nd, some statutes have passed which create the crime of treason, by declaring, that the ‡ offender shall be deemed

H. 8. ch. 7. pl. 21. 35 H. 8. ch. 1. pl. 15. 26 H. 8. ch. 13. pl. 2. 1 Ed. 6. ch. 12. pl. 6. 7. 5 and 6 Ed. 6. ch. 11. pl. 3. 4. 1 Mar. sess. 2. ch. 6. 5 Eliz. ch. 11. 18 Eliz. ch. 1. 13 Eliz. ch. 2. pl. 3. 27 Eliz. ch. 2. pl. 3. 1 Anne, st. 2. ch. 17. pl. 3. Irish stat. 33 H. 8. sess. 1. ch. 1.

* 20 H. 6. ch. 3. Irish stat. 13 H. 8. ch. 1.

† 1 Ed. 6. ch. 12. pl. 9. 5 and 6 Ed. 6. ch. 11. pl. 5. 1 and 2 Ph. and Mar. ch. 11. 1 Eliz. ch. 1. pl. 30. 27 Eliz. ch. 2. pl. 5. 3 Ja. 1. ch. 4. pl. 22. 23. 13 C. 2. st. 1. ch. 1. 13 Wm. 3. ch. 6. pl. 15.

‡ 13 Wm. 3. ch. 3. pl. 2. 2 and 3 Anne, ch. 29. pl. 34. 17 G. 2. ch. 39. pl. 1. 2.

deemed guilty of treason, and shall suffer as in cases of high treason, or by declaring that the * offender shall be guilty of high treason, generally. The 10 H. 7. ch. 21, evidently enacts, that murder shall be high treason by the † same words by which some of the statutes above al-
 Secondly. luded to, create that offence; so that the authority of ‡ Sir Matthew Hale is so far
 a con-

* 9 Wm. 3. ch. 1. pl. 4. 3 and 4 Ann, ch. 14. 4 Ann, ch. 8. 8 and 9 Wm. 3. ch. 25.

† Vid. note †, ante p. 75, and the cases there cited.

‡ The reader will find in 1 Hal. P. C. ch. 24, 25, from page 258 to 342, a recapitulation of all the statutes of treason, from the 25th Ed. 3. to the 13 C. 2. ch. 1. with judicious comments by Sir Matthew Hale. The statutes of treason enacted since Sir Matthew Hale wrote, have been collected by Serjeant Wilton down to 7 Ann, ch. 21, and are to be found *ibid.*—In shewing that the 10 H. 7. ch. 21, has sufficient express words to create the crime of treason, I conceived that the clearest mode would be by enquiring by *what words* did those several statutes, (recognized by Sir Matthew Hale as the statutes of treason,)

a concurrent authority, that the 10 H. 7. ch. 21, contains sufficient express words to create the crime of treason.—

* Again, Sir Matthew Hale, speaking of the statutes in Ireland, which create treasons, observes, that the chief particular treason charged upon the Earl of Strafford, was that of cessing soldiers upon the king's subjects in Ireland, made treason by the Irish act, 18 H. 6. ch. 3. Let us see then by what express words did that statute make that offence high treason?

son,) make the offence, and then to see whether the 10 H. 7. ch. 21, had the same words with them or any of them? The result of the enquiry has been, that the 10 H. 7. ch. 21, is found to create the crime of treason by the same words with some statutes cited by Sir Matthew Hale, and also in the same manner with the statute 18 H. 6. ch. 3, of Ireland, upon which an article of impeachment was grounded against Lord Strafford.—I think, therefore, I may quote (not unwarrantably) Sir Matthew Hale as an authority that 10 H. 7. ch. 21, makes the crime of murder high treason, by sufficient express words.

* 1 Hal. P. C. ch. 14. p. 147.

son? Certainly by words much less strong than those of 10 H. 7. "It ^{is} enacted that "no Lord, nor any other of what condition "soever he be, shall bring or lead from "henceforth hoblors, kearns, or hooded "men, neither English rebels nor Irish "enemies, nor any other people, nor horses "to ly on horseback or on foot upon the king's "subjects, without their good wills or con- "sents, but upon their own costs, and with- "out hurt doing to the Commons of the coun- "ty. And if any so do, he shall be adjudg- "ed as traitor."—It appears, therefore,

Thirdly.

that the words of the 10 H. 7. ch. 21, are as full to create the crime of treason as those of that statute upon which the Earl of Strafford was impeached of high trea- son. The uniform *usage* of the statute,

which is the † best interpreter of laws, shews that murder has been regularly con-

con-
 Irish statutes.

† 1 Hawk. P. C. ch. 9. sect. 3. p. 43.

considered as the crime of high treason;
the murder is always laid in the indi-

F ment

• It has been objected against this usage, that trials for murder have not been regulated by the same laws with trials for high treason; that the prisoner is only permitted to challenge twenty peremptorily: that he cannot, of right, have council assigned to him; and that an appeal lies in the case of murder. All these objections, and indeed all others which may arise on this head, are satisfactorily answered by considering, 1st, That the 5 G. 3. ch. 21. sect. 1, for the better regulating trials for high treason, and by which the copy of the indictment is to be given to the party five days before his trial, in order that he may advise with his council thereon, is confined to cases of high treason under the 25 Ed. 3, and extends to none other. 2ndly, That by 10 and 11 Car. 1. ch. 9, no persons arraigned for high treason, petit treason, or felony, shall be admitted to challenge peremptorily above twenty persons, under the penalty of having the like judgment pronounced against them as they should have, if they had challenged peremptorily six and thirty, or more, before the making of that act. 3dly, With respect to the appeal.—After the stat. 10 H. 7. ch. 21, had made murder high treason, it was doubted, agreeable to the doctrine laid down in 6 Co. 13 b. Dyer 50. Saccombe's case. Style 347. (that

ment to have been committed *proditorie*, and the prisoner, if convicted, has
always

(that when a statute makes an offence treason which was before a felony, the felony is merged;) whether an appeal lay for murder, and the general determinations were, that it did not; many murders by this means went unpunished, and great inconveniences arose. At length the legislature thought proper to make a special act of parliament, restoring the right of appeal. The 9 Ann, ch. 4, reciting, *That, "whereas by an act of parliament made in this kingdom, "in the tenth year of the reign of king Henry the seventh, "intituled, AN ACT WHEREBY MURDER, OF MURDER, OF MA- "LICE PREPENSE, IS MADE TREASON; a doubt "has arisen, whether any appeal of murder, since mak- "ing the said act, can or may be brought by the subjects "of this realm and others, as the same might have been "brought before making the said act, by reason whereof "many murders have escaped unpunished; for clearing "of which doubt, Be it enacted by the Queen's most ex- "cellent majesty, by and with the advice and consent of "the Lords Spiritual and Temporal, and Commons in "this present parliament assembled, and by authority of "the same, That nothing in the said act shall from "henceforth be taken, construed, or intended to barr or "take away the right of any person or persons, from "bringing appeals of murder, but that such appeals of "mur-*

always received the * judgment, and suffered the penalties of high treason.—

F 2

But

“murder, shall and may from henceforth be had and brought, and such process, proceedings and judgment, shall and may be therefore had and given, as might have been brought, had, made and given at or before making of the said act, the said statute or any thing therein contained to the contrary in any wise notwithstanding.” Upon which statute two things are observable. 1st, That the 10 H. 7. ch. 1, is recognized as a statute which makes the offence of murder treason; and 2ndly, that the statute itself is merely enacting, which it would not have been if the appeal lay, notwithstanding the 10 H. 7.

* There are two kinds of judgment in treason, viz. the solemn and severe, and the less solemn judgment. The solemn judgment is, “That the person convicted be carried to the prison from whence he came, and be drawn from thence to the place of execution, that he be there hanged by the neck, and be cut down whilst he is alive; that his bowels be taken out and be burned before his face; that his head be severed from his body, and his body be divided into four quarters; and that his head and quarters be at his Majesty’s disposal.” Staunf. P. C. lib. 3. ch. 19. fo. 182. 3 Inst. ch. 101. fo. 210. 1 Hal. P. C. 350.

But the intention of the legislature, collected from the words of the statute, forms decisive proof, that the law was specially made for the purpose of altering the crime, of

351. 2 Hawk. ch. 48. fo. 443. Carth. 315. This solemn judgment is the one pronounced in cases of murder. The less solemn judgment is, "That the person convicted be carried to the prison from whence he came, and be drawn from thence to the place of execution, and that he be there hanged by the neck until he be dead." Ibid. It is evident from the judgment pronounced in cases of murder, that the courts have uniformly considered it as the offence of high treason. For under the 10 H. 7. ch. 21, as it before appears, the punishment is given only as *incidental* to an offence created. But what is the punishment inflicted?—That which is inflicted for high treason;—a proof that the court considers the offence as altered by the statute, to be high treason. For if the offence remains a felony, the punishment must be that of felony; the statute does not alter the punishment, only as it varies the offence, and if the offence be unchanged, the punishment remains, therefore, unaltered.—The judgment in all cases of felony is, "That the person convicted be hanged by the neck until he be dead." 2 Hal. P. C. 399.

of murder, from felony to that of treason : the offender is declared "*a traitor AT-TAINTED OF HIGH TREASON, like as IT (i. e. the treason) should extend * to our Sovereign Lord's person and to his Royal Majesty,*" that is, attainted of a treason against the king's person. So that a person who commits murder, is under the very words of the statute, (taken even literally) guilty of high treason : by which words, as it already appears, the offence of treason has been made by some

Fourthly.

F 3

statutes.

* The reason of introducing these words, was in order to quit this offence of clergy. By the statute de Clero, the 25 Ed. 3. st. 3. ch. 4. Clerks convicted for treasons or felonies, touching other persons than the king himself, or his royal majesty, were allowed the privilege of holy church. This statute gave the benefit of clergy to all treasons or felonies, other than those which extended to the king's person. If, therefore, the 10 H. 7. ch. 21, had made murder treason, merely, without other words, it would have been a clergyable offence, for it would not have been made by the statute a treason extending to the king's person. Vid. Br. Abr. tit Clergy. 24. Foster's crown law, 190.

statutes. How then, a person thus attainted of high treason, can be guilty only of a felony, I beg leave to refer to the consideration of those, who, in order to support such a position, must invert the order of crimes and punishments, and make the constitution the dispenser of criminal justice, agreeable to the sanguinary spirit of the impolitic tyrant, who punished all crimes with death, because, said he, "*the least offence deserves it, and I can inflict no greater upon the highest crime.*"—Again, the statute contains a saving of their escheats to the chief lords. * The reason of introducing this clause into the statute, will appear by considering for a moment, the consequences of an attainder in high treason.—† The party attainted, forfeits to the king all his lands and tenements of inherit-

* 1 Hal. P. C. 270. 8 H. 6. ch. 6.

† Co. Lit. 392. b. 3. Inst. ch. 1. fo. 19. 1 Hal. P. C. fo. 240. 2 Hawk. ch. 49. fo. 448.

inheritance, whether fee simple or fee tail, and all right of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, *to be for ever vested in the crown.*—The legislature, in framing the 10 H. 7, saw that by making murder high treason, the offender would thus forfeit all his lands to the crown, and that the chief lords would then be deprived of their escheats.—As it wished, therefore, that the lords should have their rights, it saved to them their escheats by this clause, without which they would otherwise have been excluded. Now, if the offence had remained a felony, * the king should only have had his year, day, and waste, and after their expiration, the lands should have escheated to the lord, without the necessity of any saving clause to have preserved them.—With respect Fifthly. to the opinion of professional men upon F 4 this

* 1 Hal. P. C. 360.

this statute, as the judicial proceedings of Ireland have not been preserved by reporters, 'tis impossible to be copious on this head; however, there have not been wanting occasions, in which the statute has frequently received elaborate explanations, both from the bench and from those whose rank within the bar, will at least stamp their observations with a respectable sanction. In the years 1652, 3, and 4, * when commissions had issued for the † trials of those persons who had some

* Cor's Hist. Irel. in reg. Charles and, fo. 70. Borlace's hist. Reb. 305.

† The most remarkable of those trials, was that of Sir Phelim O'Neal, who was convicted before the high commission court, held at Dublin in February, in the year 1652, before lord chief justice Lowther and others.—At the opening of this court, the chief justice, in a speech of considerable length, suited to the occasion, went largely into the history of the crime of murder, and after shewing how murder was punished by the law of God immediately after the flood; how by the political law of the jews; how by

some short time preceding, been guilty
of the most barbarous murders and hor-
rid

by the law under the gospel ; and how by the law
of England ; he proceeded to enquire how it came
to pass, that murder was made an higher offence,
and punished more severely in Ireland than in Eng-
land, and said, " That by the laws of Ireland wilful
" murder is high treason, which is of a temporal of-
" fence, esteemed in law to be the highest crime, and
" hath been censured with the severest punishment. It
" is considerable, why and upon what grounds or rea-
" sons, *murder was made a more horrid and execrable*
" *crime in Ireland than in England, and punished with*
" *greater severity, viz. both with torture and with*
" *death ? The statute 10 H. 7. in Ireland, which en-*
" *acts it to be so, gave the reason of the difference.—*
" *Prayen the Commons, (saith the law) forasmuch as*
" *there have been unusual murders, of malice pre-*
" *pense, used and had in this land of Ireland, &c. con-*
" *trary to the law of Almighty God, without any fear*
" *or due punishment in that behalf. Therefore the*
" *statute doth enact wilful murder to be high treason.*
" *That sin was grown universal in Ireland, and there-*
" *fore the punishment must be extraordinary, the*
" *universality of the crime causeth the increasing of*
" *the punishment or the severity thereof, Ut metus*
" *ad omnes, poena ad paucos perveniat.—But it will*
admit

rid massacres, frequent opportunities arose of convictions under the statute, all of which

“ admit another quere, How it came to pass that
 “ malice and murder was universal in Ireland more
 “ than in England ? I conceive these two reasons may
 “ be given for it as new. First, We have been these
 “ many years weltering in blood, by the frequent
 “ rebellions in Ireland, that have silenced the laws.
 “ Secondly, There was a main defect in their Irish
 “ laws and customs, viz. Their Brehon law, which
 “ the Irish continued among themselves, and the de-
 “ generate English embraced it, notwithstanding the
 “ introduction of the just and honourable law of Eng-
 “ land. Now by their Irish custom or Brehon law,
 “ murder was not punished by death, but only by
 “ fines, or a pecuniary mulct, which they called an
 “ erick. Therefore, when Sir Wm. Fitzwilliams
 “ being deputy, told M’Guire that he was to send
 “ a sheriff into Fermanagh, (being lately before made
 “ a county) the sheriff said, M’Guire shall be wel-
 “ come, but let me know his erick, the price of his
 “ head aforehand, that if my people cut it off, I may
 “ put the erick upon the county.—Now for the re-
 “ formation of these grievous abuses in the land, in
 “ the tenth year of king Henry the seventh, in the
 “ government of Sir Edw. Poynings, kn. then de-
 “ puty

which (at least those which I have seen) have been for high treason, and the court uniformly considered the crime of murder in that light. * Upon an occasion

“ puty of Ireland, there were three good and profitable statutes made, which were called Poyning’s acts, viz. The 10 H. 7. ch. 8, for the reviving, confirming, and putting in execution the statutes of Kilkenny, held before Lionel duke of Clarence; by which statutes of Kilkenny, the Brehon law was abolished, and decreed to be no law, but a lewd custom. The stat. 10 H. 7. ch. 11, by which it was enacted, “ That if any person took any money, or other amends for the death of his kinsman or friend, than the law would permit, (meaning the law of England) the same shall be felony; by this law the crick was taken away.—The statute 10 H. 7. ch. 21, by which murder *is made high treason*, in the actor, provoker, and procurer of it. So that by these three statutes their Brehon law and lewd customs were abolished, their crick taken away, and murder declared to be high treason. And thus you see how it came to pass, that murder *is a greater offence* and more severely punished in Ireland than in England.” Vide MSS. in Trim. Coll. Dublin; and also Borlace’s Hist. Irish Reb. 305. 311.

• The trial of Henry baron Barry, of Santry, upon

tion more modern, and rendered somewhat remarkable, on account of the rank of the person accused, and the solemnity of the proceedings; * the king's first law

an indictment for the murder of Laughlin Murphy, before Thomas lord Wyndham, high steward of Ireland, at the parliament house, on the 27th April, 1739.

• The prime serjeant, who addressed the court to the following effect, " Henry baron Barry, of Santry, " the prisoner at the bar, stands indicted for the murder of Laughlin Murphy, and the indictment states, " that the prisoner, on the ninth day of August last, " at Palmerstown, in the county of Dublin, did trait- " terously, feloniously, and of malice forethought, " make an assault on the said Laughlin Murphy, and " with a naked sword which he had then in his hand, " gave him a stab in the left side, of which the said " Murphy languished at Palmerstown, and after in " the city of Dublin, till the 25th September follow- " ing, and then and there died; and so the indict- " ment concludes, that the noble lord, the prisoner, " did traiterously kill and murder the said Laughlin " Murphy, in manner aforesaid. The crime charged " upon the prisoner, is of so heinous a nature, that " the legislature hath enacted it to be high treason, " and

law officer, in stating the case for the crown against the prisoner, expounded the indictment (which was laid under the 10 H. 7. ch. 21.) to be for high treason,

“ and thereby made offenders of this kind, subject to
 “ the same judgment and punishment as traitors guilty of the highest species of treason, (I mean of that
 “ against the person of his sacred majesty) are liable
 “ to.—The design of the legislature, I presume, was
 “ by this means, to restrain persons of all degrees
 “ and conditions, from those acts of violence which
 “ might produce murder, and by the terror of the
 “ punishment, to provide for the safety of the meanest subject.—Thus it is enacted by the 10 H. 7. ch.
 “ 21, That if any person or persons, whatsoever
 “ estate, degree or condition he or they be of, of malice prepenſe, do ſlee or murder any of the king’s
 “ ſubjects, be deemed traitor attainted of high treason, likewise as it ſhould extend to our ſovereign
 “ lord’s perſon, and to his royal majesty.—Theſe are
 “ the words of the ſtatute, and agreeable thereto,
 “ the indictment charges that the priſoner did traitorouſly kill and murder the ſaid Laughlin Murphy.”—I have taken this extract from a manuſcript containing the proceedings on the trial of Lord Santry, obliſingly communicated to me by Mr. Arthur Wolfe.

son, and said, " That the legislature had
 " by the statute enacted *the crime of murder to be treason, and thereby* made the
 " offenders subject to the same judgment
 " and punishment as traitors guilty of
 " the highest species of treason."

It seems manifest, therefore, from the comparison made between the enacting words of the statute under consideration, and those of other statutes which are acknowledged to constitute the crime of treason, and by considering the usage which has uniformly prevailed in the exercise of this particular law, a rule, which in the exposition of antient statutes, is certainly the best that can be adopted; by observing also the intention of the legislature, as collected from the statute itself, and by contemplating the opinions of different professional characters thereon, that the Irish statute of murder, contains sufficient express words to create, and does enact that offence to be high treason

treason in the actor, provoker, and procurer. *

Let

* I have met with one case, in which an objection somewhat similar to that which we are now discussing, arose. It is reported by Dyer, and was as follows: "A woman had poisoned her husband in Devonshire, which offence was made treason about the thirty-first year of the reign of Henry the eighth, (by stat. 22 H. 8. ch. 9, which enacted, "That wilful murder should be high treason, and that the offender should be boiled to death.") By a general pardon granted in the thirty-second of that king's reign, this offence was pardoned; now the son brought an appeal of murder against the wife, and whether the appeal lay was the question. Some thought that by the offence being made treason, every lesser offence was drowned, and that the offence of murder, which was before at common law, was merged, and was not punishable as murder, but as treason, and that therefore no appeal lay. But others thought the contrary, and that the first offence was not taken away by the increasing of the punishment, but still remained. The opinion of the court, however, was, that the appeal was not maintainable." Vid. Dyer, fo. 30. a. b. Saccombe's case.

Let us next enquire whether the receiver of a murderer, is within the meaning of the statute, a principal traitor, or whether, according to the opinion of some, he remains only as he did before the making of the act, in the nature of an accessary, and guilty of a felony only, or guilty of a mere misprision of treason, in concealing the offender and screening him from justice. * Sir Matthew Hale seems to think that the guilt of a receiver depends entirely upon the special wording of the statute which creates the treason. Thus, says he, "If an act of parliament enact a new treason, and that the offender, his counsellors, abettors, and aiders thereto, shall suffer as traitors; this doth not make receivers or comforters, after the fact, guilty of treason, for *expressum facit cessare tacitum*; such a clause we shall find in the stat. 23 Eliz. ch. 2, for a new felony;

* 1 Hal. P. C. fo. 235, 6, 7, 614.

" lony ; 5 Eliz. ch. 1, in a case of præ-
 " munire." Again, " If an offence be
 " made treason in the offender, his pro-
 " curers, counsellors, abettors, consen-
 " ters, (without the words *thereunto*) yet
 " it seems to me, for the same reason it
 " doth not make the knowing receivers
 " traitors, unless the words receivers or
 " comforters be also inserted : for the
 " former words import an offence præ-
 " ceding or concomitant to the act of
 " treason, but the latter words receivers
 " and comforters are after the offence,
 " and so of another nature : and this
 " difference appears expressly by the sta-
 " tute of 13 Eliz. cap. 2, where abettors,
 " procurers and counsellors, are made
 " guilty of high treason ; but receivers
 " and comforters, after the fact, are only
 " within the statute of præmunire ; the
 " like in 27 Eliz. ch. 2, where the com-
 " ing of a priest, &c. is treason, but his
 " receiver, aider or comforter, is felony :
 " so 5 and 6 Ed. 6. ch. 11, and 1 Eliz.

G

" ch.

“ch. 5, the offenders, their counsellors,
“abettors and procurers, and all and
“every their aiders and comforters know-
“ing the same extend to knowing receiv-
“ers.” And again, “If the act be ge-
“neral, making a man a traitor for such
“an act, without mentioning in what
“degree his aiders or abettors, comfort-
“ers or receivers shall be, it seems pro-
“bable, that the receiver, knowing it,
“is thereby virtually made also a traitor;
“this, I say, seems probable, but most
“certainly procurers, consenters, and
“aiders to the fact, are thereby traitors,
“though not specially so enacted; this
“is agreed in Conyer’s case, Dy. 296.
“Co. P. C. 16 and 138.” * Sir Michael
Foster, seems also to allude to this con-
struction of these several statutes, thus
expounded by Hale, when speaking of
accomplices in high treason, he says,
“That every instance of incitement, aid
“or

" or protection, which in the case of fe-
 " lony, will render a man an accessory
 " before or after the fact, in the case of
 " high treason, whether it be treason at
 " common law or by statute, will make
 " him a principal in treason, unless the
 " case be otherwise provided for by the
 " statute creating the offence, *or where the*
 " *special penning of the act leadeth to a*
 " *different construction.*" This construc-
 tion upon those statutes which create trea-
 son or felony, and are silent as to re-
 ceivers, seems to have been borrowed by
 Sir Matthew Hale from * Staunford, who
 treating in his pleas of the crown, of
 principal and accessory, says, " That it was
 " the opinion of some, that although ac-
 " cessaries before the fact, were within
 " the meaning of a statute creating a fe-
 " lony, where they were not specially
 " named, yet accessories after the fact,
 " were not, unless particularly described
 " in the statute, and assigns as a reason,

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" That

* Staun. P. C. Lib. 1. fo. 44, letter C.

“That if a man be acquitted as principal, he is, of course, acquitted as accessory before, but not as accessory after; and also, because it cannot be said that the legislature intended that accessories after should be included, when it has not specially named them.”

But at this day it seems the better opinion, * that when a statute makes an offence treason or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, *unless there be an express provision to the contrary.* The case of † Conyers, reported by Dyer, seems

* 2 Hawk. 314. ch. 29, sect. 14, and the books there cited. 3 H. 7. 10. pl. 2. Staun. 3. 2. letter A. fo. 40, letter C. ch. 44.

† He was indicted “quod proditorie receptasset, &c. Fairfax, sciens ipsum diversas pecias monetæ, Angliæ vocat shillings, de falso metallo fabricasse; he was found guilty, but the judges did not proceed to judgment of treason upon the indictment, for it was ruled

seems not to be warranted upon the ground of solid reasoning; for if it be only misprision of treason to receive and harbour a traitor, then should the receiver of a traitor suffer a less * punishment than he who received a felon; a doctrine which would lead to the most manifest absurdities, and if allowed, would establish the greatest injustice. It would seem certainly the most reasonable and legal opinion, that nothing short of an express provision, should prevent that

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con-

ruled to be but misprision of treason only. Dyer 296. a. b. Lord Coke, in observing upon this case of Conyers, says, "When it is said that the offence in "Conyer's case was but misprision of treason, that "cannot be, because there was a consent, and not a "concealment only; otherwise high treason being "the highest offence, should have more favour than "felony; for the receiver and comforter, in case of "felony, is punished by death, and so is not he that "commiteth misprision of treason." 3 Inst. 138.

* The punishment of misprision of treason, is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life. 1 Hal. P. C. fo. 374. 4 Black. 120.

construction of a statute, which is most consistent with the true principles of law, and conformable to those rules by which statutes are usually expounded.—It is confessed, that when a statute creates a new * treason or felony, that those offences derive under the statute by necessary implication, all those incidents which the same offences at common law are usually acknowledged to possess. Now to a treason or felony at common law, it is an inseparable incident, that those who procure those offences to be committed, who assist in the commission of them, or who comfort or assist the offender, are alike principals with himself; and yet it is denied that the receiver of an offender in treason or felony, created by statute, is guilty of either treason or felony, unless made so by special words expressed in the statute for that purpose.—But where it may be well

* 2 Hawk. P. C. ch. 29, sect. 14, fo. 314. 1 Hal. P. C. 704. 2 Hawk. 311. 1 Hawk. ch. 40, sect. 4. Salk. 542, 3. 3 Inst. 61, 62, 72, 73.

well asked, is the necessity of expressing that, which is supplied by necessary implication? * In those instances in which it has been done, it seems rather to have been introduced *ex abundanti cautela*, than *ex necessitate rei*.—In all those cases in which the legislature has thought proper to make the crime of a receiver less than that of the principal offender, it has found it expedient to introduce a special clause for that purpose, as in 13 Eliz. ch. 2. 27 Eliz. ch. 2. 5 and 6 Ed. 6. ch. 11, and some others; and why? Not because without such clause the receiver would not be punishable at all, (for that would be absurd) but because without such a clause, the receiver would be punishable in the same manner as the principal offender, which the legislature thought too severe, and therefore provided against by express words.—The weight of authorities is entirely against

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the

* Bac. Abr. vol. 5, fo. 127, pl. 12.

the distinctions of Sir Matthew Hale, and the reasoning upon the point, is decisively in favour of that doctrine, which destroys the difference between those offences, as existing at common law, and created by statute, and gives to them the same incidental qualities, as to the offenders, their guilt, and their punishment. The ground upon which the arguments of those who contend for the distinctions laid down by Sir Matthew Hale, are supported, will be best conceived by considering them in the following point of view : When a statute makes an offence treason, which was before the making of the statute but a felony at common law, and does not mention in what degree receivers shall be guilty, it either makes the receiver of the offender, impliedly guilty of treason, or it leaves him as he was before, guilty of felony, as an accessory after the fact, for the guilt of the receiver, as it depends upon the degree of criminality in the person received, cannot

not become less, in proportion as the guilt of the person received becomes greater, I mean without express words in a statute for that purpose. Now, at common law, no man could be guilty of felony, *merely* in receiving a traitor, and an indictment, * “quod sciens eum prodicionem prædictam perpetrasse *felonice* hospitatus fuit, &c.” was adjudged bad, because it was as for an accessorial offence, which could not be, as in treason all are principals. Therefore, the receiver must be guilty of treason; created impliedly by the statute.—Again, when a statute enacts a treason generally without expressing receivers, it either makes them guilty as traitors, or they become thereby guilty of misprision of treason only;—Now every † act, which in the case of felony will render a man an accessory, will, in the case of treason, make him a prin-

* Staun. P. C. fo. 3, letter A.

† Foster 343.

principal; but a receiver, in the case of felony, is an accessory, therefore in the case above, the receiver is a principal traitor.—These observations are strengthened by the express words of Serjeant Hawkins upon the very point: He says, “ * There seems to have been formerly
 “ some opinions, that the receivers of a
 “ felon by statute, shall not be adjudged
 “ accessories to the felony after the fact,
 “ in the same manner as the receivers of
 “ a felon at common law; because such
 “ persons can in no propriety of speech,
 “ be said to have done the thing prohibited, as the procurers of it may be
 “ said to have done: But this seems to
 “ have been more strongly holden in respect of those statutes which expressly
 “ provide that accessories before, to the
 “ offence prohibited, shall be punished as
 “ felons, &c. but say nothing of accessories after; from which words it
 “ may

* Hawk. P. C. vol. 2, ch. 29, sect. 14, fo. 314.

" may be argued, that they must be either
 " intended to exclude accessories after
 " the fact, or have no manner of effect.
 " Yet, I take it to be settled at this day,
 " that in these and all other cases, where
 " a statute makes any offence treason or
 " felony, it involves the receiver of the
 " offender in the same guilt with him-
 " self, in the same manner as in treason
 " or felony at common law, *unless there*
 " *be an express provision to the contrary.*
 " For since it is agreed, that such new
 " treason or felony shall have the same
 " construction with a treason or felony
 " at common law, to all intents and pur-
 " poses, why should it not also have the
 " same, in relation to those who are to be
 " esteemed principals and accessories in
 " it? And as to the objection, that the
 " receivers of the offender cannot thereby
 " be so properly said to have done the
 " offence, as the accessories before, it
 " may be answered, That they may be
 " properly enough said to be partakers in
 " the

" the guilt of the offender ; and what
 " crime such a partaking shall be adjudg-
 " ed to amount to, is most reasonably de-
 " termined by the rules of law in other
 " cases of like nature. And as to the
 " objection, That a statute by expressing
 " accessaries before, must be intended to
 " exclude accessaries after, or to have no
 " manner of effect, it may be answered,
 " That nothing is more common than for
 " statutes to express those things which
 " the law would have implied ; in which
 " cases it seems a very reasonable con-
 " struction, That *expressio eorum quæ
 " tacite insunt nihil operatur.*"

Thus does it appear, that upon the
 construction of the 10 H. 7. ch. 21, The
 receivers of a murderer are guilty of high
 treason, and that, by a kind of necessary
 implication, inseparably connected with
 the statute, which gives to the offence it
 creates, all those natural incidents, which
 had it been for the same offence at com-
 mon

mon law, it must indisputably have possessed.

I come now to consider that doctrine which has always prevailed in cases of high treason,* by which all the Participes Criminis, are in law esteemed principals, and adjudged to be equally guilty.—† In the highest and lowest offences, viz. treason and trespass, there are no accessaries, but the law, although in these offences it has placed all accomplices upon the same footing, has made this disposition upon reasons widely different, yet critically just.—‖ In treason all are principals, upon account of the heinousness of the crime, “ propter

* Staunf. P. C. fo. 40, letter C. Br. Corone 135. Treason 19. Co. Lit. 57. b. 2 Inst. 183. 3 Inst. ch. 2. fo. 20, 21. ch. 64. fo. 138. 12 Co. 81. 82. Hale's Sum. 215. H. P. C. 613. 2 Hawk. ch. 29. sect. 2. fo. 310, 311. Foster 341.

† Ibid.

‖ 4 Blackst. Com. ch. 3. fo. 36.

"*propter odium delicti*," it being the highest offence which the laws recognize, it was thought expedient to provide against it, not only by the severest punishments, but by also withdrawing from the offender that equitable lenity, which in crimes less enormous, the law humanely and with great wisdom extends to him, aptly suited to the relative complexion of his guilt: whereas in trespass, which is the lowest species of offence, the law which "*de minimis non curat*," and which for these petty misdemeanors, imposes a punishment equitably rated, will not descend to distinguish their different shades of guilt, or to discriminate between offenders, in cases where the highest punishment they can by law receive, is not too great, for even their relative delinquency.

Although this doctrine has been universally admitted in the latitude above expressed, yet it hath been said, that
 upon

upon the trial of the offenders, the rule should be understood with those limitations which sound sense and common equity require. * "For," says a learned judge, "Cases have frequently happened, where an offender in the final issue of a prosecution, may be considered as a principal in treason; and yet during the intermediate steps towards his conviction, he ought, from a principle of natural justice, to be considered merely *as in the nature of an accessory before or after the fact.*"—Under the weight of this authority, and also of Sir Matthew Hale, who was quoted to the same point; it was contended on behalf of George Robert Fitzgerald, Esq, in the course of the proceedings lately had in the county of Mayo, "That he would, in case of felony, have been but an accessory before the fact, that he should
"be

* Foster 341. et seq. Hal. P. C. 613. 1 Anderson, fo. 109.

" be considered therefore in the nature
 " of such, and that according to the doc-
 " trine established in those cases, the prin-
 " cipal offender should be convicted be-
 " fore he was put upon his trial." • This
 objection was over ruled by the court,
 and Mr. Fitzgerald was accordingly tried
 before any of the principals were con-
 victed.

I shall first endeavour to obviate the
 objection, and secondly, consider the case
 of Mr. Fitzgerald, as it appears under
 its special circumstances.

FIRST.

There can be no doubt but the rule
 as laid down by Sir Michael Foster and
 Sir Matthew Hale, should in all trials for
 treason, (where the offender would, if it
 were a felony, be guilty as accessary *after*
 the fact merely, as by receiving and aid-
 ing a traitor, &c.) be admitted in its full-
 est

• Vid. Fitzgerald's trial.

est extent. The offender in that case is guilty of treason by an act *ex post facto*, i. e. by some act done relatively to something pre-existing, which is in itself high treason.—* Thus one who rescues a traitor is guilty of treason; why? Because the person he rescued is a traitor; so one who receives a traitor is guilty of treason; why? Because the person he received is a traitor; his guilt is literally *derivative*, it depends upon the guilt of *him* whom he has received or rescued; if the person received be convicted of felony, the receiver is only guilty as accessory after the fact to a felony, for the guilt of an accessory can never rise higher than that of the principal; his guilt being then dependant upon that of another person, 'tis essential to his conviction,† that the other

H person

* 1 Hal. P. C. 234, ch. 22, per tot.

† As the guilt of the receiver follows that of the person received, in order to convict a receiver of treason, 'tis necessary that the person received be a traitor;

person be first proved to be guilty, this can only be by his being convicted; so that the trial of the principal antecedently, is necessary to the conviction of the accessory *after* the fact. Thus far sound sense, equitable discretion, and I might add, *the purposes of justice require*, That in all cases of high treason it is essential, that the principal in the first degree be convicted, before he who is principal in the second degree by an act *ex post facto*, be put upon his trial. I said the purposes of justice require it, for suppose the receiver of a traitor brought to trial before the principal in the first degree be convicted, he

tor: but nothing short of the record of the conviction of such person, should upon the trial of the receiver, be admitted as evidence of the party's being a traitor, because the jury cannot find collaterally, that the party was a traitor, (that fact being matter of substance in the indictment,) as they may do in the case of a procurer. The precedent conviction of the principal in the first degree, is therefore obviously necessary in prosecutions of the receivers. *Vid. post.*

he must necessarily be acquitted; for his conviction would be contrary to the spirit of the act of parliament, which reversed Mrs. Lilles' attainder: "For that she was by an irregular and undue prosecution, indicted for entertaining and concealing John Hicks, a false traitor, knowing him to be such, *though the said Hicks was not at the time of the trial, attainted or convicted of any such crime.*"

Let us next enquire whether there is the same necessity that the principal who committed the treason be first convicted, before he who procured that treason to be committed, be put upon his trial? Or in other words, "Whether upon the trial of him who is guilty of treason *a parte ante*, and upon the trial of him who is guilty of treason by an act *ex post facto*, there is the same necessity, That he who

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committed the treason be first convicted?

In investigating this point, I shall consider First, the procurers of treason as in the nature of accessaries, who by construction of law, have been changed into principals, and enquire what alterations their relative situations have sustained, as incident to this change, from accessory to principal? And, Secondly, I shall compare the cases of procurers of treason, and those who are guilty of that crime *ex post facto*, and endeavour to point out such marked distinctions between them, as must fix exclusively, the application of the rule contended for, to those cases only, in which the offenders would in felony, be considered as accessaries after the fact merely.

* Originally persons present, aiding and assisting

• Staun. P. C. lib. 1. fo. 41, letters A, B. fo. 48, lcn

assisting at a felony, were considered but as *mere accessaries at the fact*. The case in the year books, the 40 Edw. 3, fo. 42, pl. 22, is decisive to shew, that at that period, the construction above alluded to existed.—As they were considered but as mere accessaries, they could not be put to answer until the principal was attainted, and the practice was to admit them to bail, and have them brought in when the principal was attainted, as appears by the following case: “One William de C. was appealed, for that he was aiding, present, and commanding one T. who on a certain day killed one W. de K. the husband of the plaintiff; and because that the principal was not attainted, by exigent or otherwise, the defendant was let to mainprize. And afterwards the principal was attainted by exigent, H 3 and

let. B. Bract. lib. 3. sect. 11, 13. fo. 128. a. ch. 19. sect. 11. fo. 139. a. ch. 21, sect. 8, 10. fo. 142. a. b. Plow. Com. 97 et seq. 2 Hawk. ch. 29. sect. 7. fo. 311. Foster 347, 348.

"and afterwards W. was put to answer,
 "and was arraigned and pleaded not
 "guilty, and was let to mainprise, *quia*
 "*accessarius, &c.*" 40 Edw. 3. 42. pl. 22.
 In the reign of Henry the fourth, the
 judges finding many inconveniences arise
 from this distinction, agreed to consider
 persons present, aiding and assisting
 as principals. This construction was
 solemnly established by the judges who
 presided in the commission held at Sa-
 lop, anno 1, Queen Mary, when it
 was ruled, that persons aiding and present
 at the fact, who were but accessaries be-
 fore, might, being principals, be tried
 before the persons who had given the
 stroke, or committed the fact at which
 they were present. This practice has ever
 since continued, being a necessary inci-
 dent to the construction, "that persons
 "present aiding and assisting are princi-
 "pals."—It seems to follow therefore,
 that by a necessary construction of law,
 it is incident to the situation of a prin-
 cipal

cipal offender, to be tried distinctly or
 conjointly, with other principal offen-
 ders, as the case may happen, his guilt
 being complete and substantive of itself,
 and not depending upon that of another
 person.—The force of this position will
 appear more strongly, by considering a
 few of those cases, in which accessories
 at the fact, after the construction above
 alluded to prevailed, have been consider-
 ed as *distinct principals*, and treated as
substantive offenders.—In Plowden, fo.
 97, the first year of Queen Mary, the case
 was, “Divers persons of the county of
 “Montgomery, were indicted for killing
 “Oliver ap David ap Hoell Vaughan, at
 “Bereu, in the said county of Montgo-
 “mery, of malice prepense, viz. some
 “for giving the wounds whereof he died,
 “and Griffith ap David, ap John, and
 “others, for that they were present, aid-
 “ing, comforting, and abetting the others
 “to commit the said murder. And they
 “who gave the wounds to the said Oliver,
 H 4 “and

“ and killed him, had fled and escaped,
 “ and Griffith ap David, ap John, and the
 “ rest, were brought to the bar. And
 “ whether they should be arraigned or no,
 “ was a doubt, and was moved to the
 “ other justices by Bromley; for he said
 “ to them, “ that although they who were
 “ present and abetting, were principals
 “ as well as they who struck the man and
 “ killed him, yet they are principals in
 “ the second degree, viz. in respect that
 “ the others who struck the said Oliver
 “ and killed him, are principals in the
 “ first degree, by reason of the act of kil-
 “ ling him, and these others, who abet-
 “ ted them and were present, are also
 “ principals, but that in the second de-
 “ gree only, and in respect of the first
 “ act; for if the others did not kill the
 “ man, then if the said Griffith and the
 “ rest who were present and abettors,
 “ should be now arraigned, and it should
 “ happen that they should be found guil-
 “ ty, and afterwards the others, who are
 “ indicted

“ indicted for giving the stroke and killing
 “ the said Oliver, should be taken and
 “ arraigned, and it should happen that
 “ they were acquitted as it might be,
 “ then I would know your opinions
 “ what should be done ?” The court af-
 ter taking two days to consider, resolved
 that they might proceed with the prison-
 ers at the bar, without any inconvenience
 arising from it, “ For as well those who
 “ gave the stroke as those who assisted,
 “ are principals in the same degree. And
 “ if (said they) we should arraign the
 “ prisoners now at the bar, and the jurors
 “ should give a special verdict, viz. that
 “ Oliver was struck and killed by another
 “ person named in the indictment, and
 “ not by those that are expressed in the
 “ indictment to have given the wounds,
 “ and should also find, that all the others
 “ named in the indictment were present,
 “ abetting and comforting him, whom
 “ they now found gave the stroke, to do
 “ the same, should not this verdict be
 “ good?

" good ? Yes, certainly ; and the prisoners
 " now at the bar should upon this verdict
 " be adjudged to be hanged, for the jury
 " hath agreed in that which the law saith
 " is the effect of the indictment ; that is,
 " they have found them all principals,
 " and as the law saith, in one same de-
 " gree ; and so the variance in the cir-
 " cumstance of the indictment is not ma-
 " terial. And if it should happen that
 " they, who by the indictment are found
 " to give the wounds, should die before
 " they are arraigned, it is clear enough
 " that Griffith and the others now at the
 " bar should be arraigned, which is a
 " proof that they who are now at the bar,
 " are accounted in law as much princi-
 " pals as the others, and in the same de-
 " gree and not in a second degree, for if
 " it was in the second degree, then would
 " it be hard to arraign them ; when he in
 " the first degree could not be arraigned,
 " but is discharged by death. For which
 " reasons, it seemed to them that the
 " prisoners

"prisoners now present might be ar-
 "raigned; and therefore they were ar-
 "raigned, and pleaded not guilty." In
 1 Hale 437. the case is, "If there be an
 "indictment of murder or manslaughter
 "against A. that A. felonice, &c. per-
 "cussit B. whereof he died, and that C.
 "and D. were present, aiding, abetting
 "and assisting to A. ad feloniam, et mur-
 "drum, &c. modo et forma prædicta
 "faciend, and A. appears not, but B. and
 "C. appear, they shall be arraigned and
 "receive their judgment, if convict, tho'
 "A. neither appears, nor be outlawed.—

From these cases it appears, that an
 accessory when made a principal, be-
 comes by construction of law, a complete,
 substantive, independant offender, and
 as such may be tried and convicted, al-
 though the accomplices with whom he
 may have acted, should neither appear
 nor be attainted. It also appears, *that in*
the crime of murder, those who were ori-
 ginally accessories, and by construction of
 law

law made principals, are at common law, upon their trials, denied those advantages which before, in their situation of accessaries, they must indisputably have possessed. If then a statute makes certain other persons, who at common law were accessaries, principals in the very same crime, Why then shall not it (seeing that it gives to those principals all the incidents which they should have at common law,) deprive them of their accessorial privileges, and place them on the same footing precisely with those who by *construction of law*, are esteemed as principals? I confess, I cannot see why it should not.—Again in *pari ratione*, all those arguments which are adduced in favour of the doctrine, “that in treason he who committed the fact should be tried and convicted before him who procured that fact to be committed, apply equally to support the objection, that in murder he who gave the stroke should be convicted, before that he who was only abetting shall be

be tried ; for there is precisely the same ground to say, that unless A. be convicted of giving the stroke, it does not appear that B. assisted him to commit the murder, as to say, that unless C. be first convicted of committing the treason, it does not appear that D. procured him to commit treason. Whereas by considering, that in cases where all are principals in the same degree, the act of one is the act of all, and that in contemplation of law, they may all be said to have *done* the act, it is obvious, that as each person has himself committed a complete act, he may for that act be, of course, distinctly tried. It seems to follow therefore, necessarily, by parity of reason, " That if, in cases of treason, those who are in the eye of reason, merely in the nature of accessaries before or after the fact, are by legal construction made principals ; they

* Vid. ante note *, p. 116, 117, and the cases there cited.

they also as substantive offenders, may be tried independently of any of their accomplices. — I have already urged some reasons why he who becomes a traitor by an *act ex post facto*, should in the intermediate steps towards his conviction, be excepted out of the general rule above laid down, and be considered rather *in the nature* of an accessory after the fact. I shall now endeavour to shew, that in the prosecution of offenders, *a parte ante* in treason, (i. e. of those persons who in felony would be but accessories *before* the fact,) the same equitable rule ought not to be observed, and that in the cases of such persons, there does not exist any principle, which ought to direct the discretion of the court to apply the rule in their favour; I shall also as I proceed, point out those distinctions between their cases and those of offenders by some *act ex post facto*, which will confirm the reason of the exception above laid down, and justify the application of the rule, in the

the latitude contended for, viz. "That it should be extended only to those who, from their relative degree of guilt, may *literally* be said to be derivative offenders.

* And First, a person who procures a treason to be committed, is in law considered as having himself committed that treason; that fact may well enough be said to be done by him, which originally moved from him, and was done by his procuring and special commandment. † Thus one who is consenting to the making of false money, in the eye of the law, is presumed to have made that false money himself, because he is *particeps criminis* before the fact done: So if one procure another to counterfeit the great seal,

* Staunf. P. C. lib. 1. fo. 41, let. D. Pl. Com. 475. Moor 787. Hale's Sum. 217. H. P. C. 617. 2 Haw. ch. 29, sect. 2, 7. fo. 311, 312.

† 12 Co. 82. Kely 52, 53. 1 Salk. 334. 2 Salk. 412.

feal, he himself, in law, counterfeits it. Upon this special reason it is, * That if a statute ordains, that those who are guilty of the thing prohibited by it, shall be adjudged traitors, it by necessary implication, makes all the procurers and abettors of it principals, upon the same circumstances which will make them such in treason at common law; "*Because such persons may properly be said to have done the thing in such a manner caused by them, and consequently to come within the very words of the statute.*"—† As for receivers, they are only guilty as they partake of the guilt of the offender; their criminality is ascertained by those rules of law which obtain in like cases, in all which, the guilt of the person received, is the standard by which that of the receiver is regulated, who is no farther a sharer

Secondly.

* 2 Hawk. ch. 29. sect. 13. fo. 314.

† 12 Co. 82. 1 Hal. P. C. 238. 2 Hawk. ch. 29. sect. 14. fo. 314.

sharer in the original guilt, than as he screens and comforts the offender, and thereby assents to the treason.—* Again, the procurer of a treason may be indicted generally for committing the fact; as if one procures another to counterfeit the great seal, he may be indicted generally for *having counterfeited* it; and evidence of the procurement will support the indictment. This is a natural consequence of the procurer being *equally* criminal with the perpetrator. But in the case of a receiver, the indictment must be special of the *receipt*, for the receiver cannot be charged generally *with the fact*; if he be indicted by a several indictment, he shall not be tried till the principal be convicted; and if he be indicted specially of the receipt, in the same indictment with the principal offender, yet the jury must be first charged to enquire of the
 I prin-

* 12 Co. 82. 1 Hal. P. C. 238. 2 Hawk. ch. 29, sect. 14. fo. 314.

principal offender; and if they find him guilty, then to enquire of the receipt, and if the principal be not guilty, then to acquit both. Again, let us see how far the several grounds, upon which it is contended, "*that the person who committed the treason, should be tried before the prisoner,*" are sufficient to support that doctrine? And first, it is said, that unless it is before hand proved, that a treason has been committed, (which can only be, it is insisted on, by the conviction of the person who committed it) there is no colour for putting a procurer on his trial, for "*non constat*" that any treason was procured, when it does not appear that a treasonable act has been done.—If, as is before observed, the procuring treason to be committed, and the commission of treason, be in law the same act, the objection, I conceive, is completely answered. But I do not wish to rest merely upon this ground. The objection will be fully obviated by considering, What is the substance

substance of that indictment, by which a person is charged with having procured another to commit treason?—It is simply, Whether he did procure a treason to be committed? It is not whether he procured A. B. or C. or any *particular person*, to commit treason, but merely, was a treasonable act done by his procurement? Who the person was that committed the treason, is no substantial part of the indictment; that relates only as to the *manner*, which is not material, and if there is a variance as to that, between the verdict and the indictment, it matters not, provided the substance of the indictment is rightly found by the jury. This observation will be more fully illustrated, by considering those cases which bear a strict analogy to the doctrine now advanced, viz. “* That when the sub-

I 2 “ stance

* Plowd. Com. fo. 101. 9 Co. 67. b. Macally's case. 9 Co. 112. a. Marys's case. Hale's Sum. 265. 2 Hawk. ch. 46. sect. 37. fo. 437. ch. 47. sect. 4. fo. 439, 440.

" stance of the fact, and the manner of
 " the fact, are put in issue together,
 " if the jury find the substance and not
 " the manner, judgment shall be given
 " for the substance." * If A. B. and C.
 " are indicted for killing I. S. and that A.
 " struck him, and that the others were
 " present, procuring and abetting A. &c.
 " and that upon the evidence it appears,
 " that B. struck, and that A. and C. were
 " present, &c. in this case the indictment
 " is not pursued in the circumstance,
 " and yet it is sufficient to maintain the
 " indictment, for the evidence agrees with
 " the effect of the indictment, and so the
 " variance from the circumstance of the
 " indictment is not material, *for the par-*
 " *ties are all principals.*" † So, " in an
 " indictment

* Plow. Com. fo. 97, 98, 100. 9 Co. 67. b. Salk.
 334, 335. 3 Mod. 121. 1 Hal. P. C. fo. 437, 463.
 2 Hal. P. C. 185, 292, 344, 345. 2 Hawk. ch. 46,
 sect. 39. fo. 437. Gilb. Evid. 271.

† Salk. 334, 335-

" indictment against A. for the murder of
 " John Cooper, and also against B. C. D.
 " and E. as persons present, assisting,
 " aiding and abetting A. therein ; E. be-
 " ing arraigned upon this indictment,
 " pleaded not guilty ; and upon evidence
 " it appeared, that the person slain was a
 " constable, and in the execution of his
 " office with divers other constables, in
 " May Fair. That E. the prisoner, first
 " drew his sword, and with divers others,
 " to the number of forty persons, fell up-
 " on the constables ; that this affray con-
 " tinued an hour after, till in the end
 " one of the constables, viz. the said John
 " Cooper, was slain ; *but by whose hand it*
 " *did not appear : It also appeared, that A.*
 " *had been tried on this indictment, and ac-*
 " *quitted.* And by Holt, C. J. Though
 " the indictment be against the prisoner
 " for aiding, assisting and abetting A. *who*
 " *was acquitted,* yet the indictment and
 " trial of this prisoner is well enough, for
 " who actually did the murder is not ma-
 " terial ;

" terial; the matter is, that a murder was
 " committed, and the other is but a cir-
 " cumstance, *and all are principals in this*
 " *case*; therefore if a murder be proved,
 " 'tis well enough. — So in the case of
 " *Banison v. Offley*; an *appeal* of murder
 " was tried against three persons, and the
 " count was, that Offley did assault
 " the husband of the appellant, and
 " wounded him in H. of which wound
 " he did languish and die in O. and that
 " *Lippon* and *Martin* were assisting. The
 " jury found a special verdict, in which
 " the fact appeared to be, that *Lippon*
 " gave the wound, and that *Martin* and
 " *Offley* were assisting.

" The exception to this verdict was,
 " that the count and the matter therein
 " alledged, must be certain; and so like-
 " wise must the verdict, otherwise no
 " judgment can be given; but here the

" *ver-*
 " *dict* was well enough.

“ verdict finding that another person gave
 “ the stroke, and not that person against
 “ whom the appellant has declared, it is
 “ directly against her own shewing.”—

The court answered the exception by
 saying, “ That it was of no force, and
 “ that the same objection may be made
 “ to an indictment, where in an indict-
 “ ment, if one gives the stroke and ano-
 “ ther is abetting, they are both prin-
 “ cipally and equally guilty ; and an in-
 “ dictment ought to be as certain as a
 “ count in an appeal.”—It seems, there-
 fore evident, that as in an indictment
 against B. for aiding and assisting A. to
 commit a murder, it is not essential to
 the conviction of B. that A. should have
 been first tried and convicted ; so nei-
 ther in an indictment against C. for pro-
 curing D. to commit treason, is it essen-
 tial to the conviction of C. that D. be
 first attainted, the substance of the in-
 dictment in those cases being, Did B. as-

first in a murder? And did C. procure a treason to be committed?

—With respect to receivers, the same principles do not at all apply. For, First, the very substance of the indictment against a receiver, is, that the person received was a traitor. Secondly, The finding by a jury *collaterally*, that he was a traitor, does not make him so, it does not amount to a conviction. Thirdly, As every person is before conviction presumed innocent, and can be at worst, but considered as a suspected person, if the person received be not first convicted, he is only in the nature of a suspected person; and I know of no law by which a person who receives another *suspected only* of treason, is thereby rendered himself guilty of treason. Fourthly, Besides * a receiver cannot be charged with having committed the fact; he cannot

* 12 Co. 82. 1 Hal. P. C. 214, 238.

not be considered as a principal in the same degree with those who have, his guilt consists in some aid afforded to the person who did the act, whereas that of the procurer, consists in his having done something relative to the act itself, viz. his having procured it.—But it is said, that if the procurer of a treason should be tried before the person who committed the treason be convicted, it might happen that a great inconvenience and absurdity would follow: For, say they, “If A. be indicted for procuring B. to commit treason, and be thereof convicted, and afterwards B. be tried for committing that treason and be thereof acquitted, A. has certainly been wrongfully attainted, inasmuch as he could only be guilty, by having procured B. to commit the treason.—This objection is evidently founded upon the presumption, that the guilt of A. depends upon that of B.

• Plow. fo. 97. 2 Hal. P. C. fo. 223.

B. whereas it appears from the foregoing cases, that A. is in himself a complete, substantive, independant offender. He has (in law) *committed* the treason, and is to all intents and purposes as guilty as B. who did actually commit it.—* Suppose then A. given in charge to the jury, upon an indictment under the statute, for having procured B. to slay and murder C. The jury find that A. procured certain persons unknown, and not B. to slay and murder C. Does this verdict agree with the indictment? Most certainly it does, for it matters not who A. procured to murder C. 'tis sufficient if it be found that C. was murdered by his procurement. Or if D. be indicted under the statute, for having procured E. to murder F. and it appears upon the trial, that E. was before acquitted for that murder, and evidence be given that F. was murdered by the procurement of D. and the jury find

* Vide ante page 132, 134, note *, and the cases there cited.

find accordingly. Does this verdict agree with the indictment? Assuredly it does; * the person who slew F. was but an instrument in the hand of D. and if it be laid in the indictment that a man was murdered with a *knife*, and the evidence be that he was murdered with an *hatchet*; this verdict agrees well with the indictment, for the substance is found.—It appears, therefore, that no inconvenience or absurdity can follow from the trial of the procurer of treason, before the person who committed the treason be convicted; because the guilt of a procurer does not depend upon that of the perpetrator, for the procurer is in contemplation of law, himself a perpetrator of the treason.—But in the case of a receiver, if he be tried and convicted first, and afterwards the person received be acquitted, then indeed an obvious absurdity may be said to arise, for inasmuch

* Gilb. evid. 186. 9 Co. sp. 67. a. h. 2 Inst. 319.
3 Inst. 50, 135. 2 Hal. P. C. 185. Hal. Sum. 265.
2 Hawk. P. C. ch. 46. sect. 37. fo. 437.

inasmuch as the receiver can only be guilty of the treason, as far as he consented thereto by the receipt or aid of the traitor, if it appears that the person he received was no traitor, it evidently follows, that by the receipt of that person, he cannot be said to have consented to treason, or be guilty of it.—Or should the jury find that A. received B. knowing him to be a traitor, (B. not being previously convicted) yet inasmuch as the guilt of A. is dependant upon that of B. and B. may, by possibility, be acquitted, though A. should be convicted; yet I conceive that the principles of sound legal discretion, would be wisely exercised, in making the fate of A. attendant upon the trial of B. for that may truly be called sound discretion, which provides against the occurrence of future inconsistency.—A third objection which has been raised is, “That a procurer of treason shall have the benefit of the acquittal of him who did the fact,” i. e. in other words, “If the

the person procured be discharged from the treason, the procurer shall not be put to answer." If the law was so, I confess the objection would have great weight, and ought perhaps to be decisive; but upon the purest legal principles, it appears that the procurer shall derive no benefit from the acquittal of the person actually committing the treason,* because among principals in the same degree, the acquittal of one is no bar to the conviction of another, and so it was determined in the † case before mentioned from *Salkeld*.

* When several are indicted for committing an offence, which may as well be done by one as by many, as for treason or felony, &c. then if the jury acquit one, 'tis no acquittal of the others; but if in the case of riot, (which is an offence that cannot be committed by one only) the jury find two only guilty, and acquit the rest delivered in charge, the verdict is void as to the two, unless the indictment charge them with such riot, *simul cum alijs juratoribus ignotis*. *State Trials*, vol. 4, fo. 160, 161. 2 *Hawk. P. C.* ch. 47. fo. 441.

† *Vid.* ante page 109.

Salkeld. What would be the substance of the prisoners plea, grounded merely upon the acquittal of the principal, in the same degree with himself? It would in effect be this, "That because the court had judicial knowledge, that one man *did not* commit the fact; it followed that the prisoner at the bar *did not* commit it, and therefore could not be found guilty of it?"—a position fraught with the most manifest absurdity.—But the reason why the receiver of a traitor shall not be put to answer, if the person received be acquitted, stands upon the firmest principles; for in cases where the guilt of a prisoner is relative, and depends upon that of some other person, it is measured by the guilt of that person upon whom 'tis so dependant, * it can never rise higher than his; of course the criminality of the principal must be ascertained, before the guilt of the secondary can possibly

* Vid. ante page 113. Bro. Corone, 119. 3 Inst. 139. Hale's Sum. 215. 2 Hawk. ch. 29, sect. 15.

sibly be adjudged ; for it would be absurd to endeavour to apportion the relative degrees of quantity which might appertain to any matter, until some standard were determined on, by which these relative degrees, might be correctly ascertained ; besides, by possibility, the *quantum* might perhaps be fixed at too great a proportion.

* I before observed, that in the highest and lowest offences, viz. in treason and trespasses, all are principals. Let us then enquire, What mode have the courts of law adopted, in the trials of offenders in this class ? For if in a trespass, the rule observed in the prosecution of the offenders is, That they may be tried as they first come in, without any respect being had to the relative connection of their guilt ; and this because the construction of law upon the offence, though committed

* Antè page 109, note *, and the cases there cited.

mitted by several is, that the act of one is the act of all, for all are principals ; it must necessarily follow, that in treason the same regulation should obtain, because the construction of law is the same, the procurer and perpetrator being considered as equally guilty. “ In trespass between Sir John Jackson and one Primate, the verdict being against Primate, he indicted the witnesses for perjury ; which being at issue and brought to trial, Sir John commanded his servant to beat and imprison the witnesses who were to prove the perjury, by which means they could not come to give evidence, so that they were acquitted. Primate moved for a new trial for perjury, which was denied, being in a criminal case, for the party once acquitted shall not be tried again. But the court directed an information against Jackson, and it was done, and he was convicted. And it

“ was

“ was moved in arrest of judgment, That
“ the information was against Jackson
“ for *procuring* A. and B. to beat and im-
“ prison the witnesses, and Jackson *only*
“ was tried and convicted, and the others
“ were not yet tried, so that non constat,
“ that they are guilty of the battery and
“ imprisonment, and therefore Jackson
“ cannot be guilty of the *procurement* of
“ *that*, which does not appear to be done.
“ But it was resolved that *he who commands,*
“ *is a principal and not an accessory,* and
“ he being found guilty, *it shall be intend-*
“ *ed that the fact was done.*”—* Upon the
same principle it is, that against joint
trespassers, there can be but one satis-
faction, and therefore if a man releases
to one trespasser, all actions, real and
personal, he shall not be allowed to sue
a second person, who was a joint tres-
passer.

I shall now proceed to examine the dif-

K **ferent**

• Hob. 66.

ferent authorities as they relate to this doctrine, and endeavour to reconcile some seeming contradictions, which appear in the books relative to the present subject.

* Sir Matthew Hale, after remarking, that in the highest capital offence, namely treason, there are no accessories, neither before nor after, for all consenters, aiders, abettors, and knowing receivers and comforters of traitors, are all principals, proceeds to observe, "that as to the course of proceeding, it hath been and ought to be the course, that those who did actually commit the very fact of treason, should be first tried before those that are principals in the second degree, because otherwise this inconvenience might follow, viz. that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be

* Hal. P. C. vol. 1. p. 613.

“be absurd.” “And again, if A. be
 “indicted of high treason, and B. be in-
 “dicted for receiving or comforting him,
 “or *procuring or abetting him*, (but not pre-
 “sent,) it is true they are all principals;
 “but in as much as B. in case of felony,
 “would have been but accessory, and it
 “is possible that A. may be acquitted
 “of the fact, it seems to me, that B. shall
 “not be put to answer of the receipt or
 “procurement till A. be outlawed, or at
 “least jointly with A. and in this case,
 “the same jury may be charged with both,
 “and their charge shall be first to en-
 “quire, whether A. were guilty, and if
 “not, then to acquit both A. and B. and
 “if A. be found guilty, then that they
 “enquire of B. And in Somerville’s case,
 “26 Eliz. mentioned before, the inquiry
 “was first of the principal offender, and
 “then of the receiver or procurer to avoid
 “that inconvenience and awersault, that
 K 2 “ might

“ might happen in case B. were first convicted of the procurement and receipt, and yet possibly A. might be acquitted of the principal fact.”

As to the first observation, it will be best obviated by considering, who may properly be said to be (in treason) principals in the second degree? As to the procurer of treason, or he who by some act done, would be an accessory before the fact in felony, but in treason is a principal; it already has appeared, that he is guilty in *equal degree* with the person who actually committed the fact, and to use the words of Sir Matthew Hale himself, “ * he may be indicted generally for *having committed the fact.*” He therefore cannot be considered as the person alluded to by Sir Matthew Hale, “ *the principal in the second degree,*” possessing as he does, all the essential qualities of the

* 1 Hal. P. C. 238.

the first and most principal traitor. But the receiver of a traitor may be well said to be the principal in the second degree, for he cannot be charged with the original offence, viz. the *committing* of the treason; he is literally guilty of treason by a *second*, and subsequent act only.—If this construction, as to the term principals in the second degree, be allowed, the book, as to the first observation, is completely reconciled, and the distinction established by Sir Matthew Hale, and which will be shewn presently, between accessaries (as he calls them) in treason *a parte ante*, and those who are guilty by an *act ex post facto*, is fully justified.

As to the second observation, it cannot be denied, but the rule as laid down, extends as well to procurers as receivers; it will be therefore necessary to be minute, in endeavouring to obviate the objection that arises upon this particular observation.—In that chapter of Sir Mat-

then Hale's pleas of the crown, which he
 has dedicated entirely to the subject of
 principals and accessaries in treason, he
 has accurately considered "how far all
 are principals in treason?" and has la-
 boured with minute precision, to point
 out distinctions between the procurers and
 receivers, in cases of high treason. After
 stating that in felony there were two
 kinds of accessaries, viz. accessaries before
 the fact, and accessaries after, he proceeds
 thus: " * Now in treason thus far it is
 " agreed of all hands. 1. That there are
 " no accessaries *a parte ante*, but all such
 " as counsel, conspire, aid, or abet the
 " committing of any treason, whether
 " present or absent, are all principals."
 After having thus in the strongest man-
 ner expressed himself, that offenders in
 treason *a parte ante*, i. e. those persons
 who in felony would be accessaries before,
 have nothing of the accessorial offender
 apper-

appertaining to them; he proceeds, "We
 " will see therefore in what cases an act
 " *ex post facto*, will be treason, in relation
 " to the aid of him that committeth this
 " or any other treason;" and then states
 the several cases in which a man may, by
 an act *ex post facto*, become a traitor, con-
 cluding the chapter thus: " * And tho' the
 " receiver of a traitor, knowing it, be a
 " principal traitor, and shall not be said
 " an accessory, yet this much he par-
 " takes of an accessory, i. That his in-
 " dictment must be special of the receipt,
 " and not generally, that he did the thing,
 " which may be otherwise in case of one
 " that is a procurer, counsellor or consen-
 " ter; thus it was done in Conyer's case,
 " Dy. 296. andly, That if he be indicted
 " by a several indictment, he shall not
 " be tried until the principal be convicted,
 " upon the reason of the gaoler and ref-
 " cuer before given, for the principal may
 K 4 " be

* 1 Hal. P. C. fo. 238.

" be acquitted, and then he is discharged
 " of the crime of the receipt of him. 3,
 " If he be indicted specially of the receipt
 " in the same indictment with the prin-
 " cipal offender, as he may be, yet the
 " jury must first be charged to enquire of
 " the principal offender; and if they find
 " him guilty, then to enquire of the re-
 " ceipt, and if the principal be not guilty,
 " then to acquit both; and accordingly
 " it was ruled in Arden's case."—From
 this statement of the very words of Sir
 Matthew Hale, it appears that the obser-
 vation before quoted from a * subsequent
 part of his work, is in direct contradic-
 tion to this passage last cited, for after
 saying that counsellors, &c. *whether pre-
 sent or absent*, are all principals, and can-
 not be in the nature of accessaries; he
 says, that if one be indicted for procuring,
 &c. (*not being present*) yet in as much as
 in a case of felony he would have been
 but

* Vid. ante page 147.

but an accessory before the fact, he shall not be put to answer 'till the principal be outlawed, or at least jointly with him. He also, in the subsequent part of his work, puts *that* as the case of a *procurer* and *receiver*, which in the former part, he seems designedly to have considered as the case of *the receiver only*. With respect to the case of Somerville, it does not appear that the enquiry was first of the principal offender, *necessarily* to avoid the inconvenience which might follow. *The case was, "One Somerville was procured
 " by Arden and others to kill the Queen,
 " and Somerville endeavoured to put it
 " into execution. The parties were
 " brought to trial, and as it appears, So-
 " merville was charged in the indictment
 " for compassing, and the others for hav-
 " ing procured him; it was agreed, that
 " as against the procurers, evidence of
 " *their having assembled together for the*
 " *purpose*

* 1 And. fo. 109.

“purpose aforesaid, and having procured
 “Somerville, should be sufficient. A point
 “was collaterally moved, but not deter-
 “mined in judgment, that if Somerville
 “had been non compos mentis, whether
 “the procurers could be tried; and the
 “opinion of the greater number was that
 “they could.”—But no inconvenience
 whatsoever could in Somerville’s case,
 have arisen from trying the procurers be-
 fore the person procured had been attaint-
 ed, for that was a case of *imagining the*
death of the Queen, in which the com-
 passing or procuring were (as is said by
 Sir Matthew Hale* and Foster) in them-
 selves, complete acts of treason. It seems
 therefore, as if the word procurer has
 been † inadvertently inserted, as by the
 omission

* Foster, fo. 344.

† When it is considered, that the part of the pleas
 of the crown, from which this sentence was taken,
 was never revised by Sir Matthew Hale, he having
 only revised to the 27th chapter of the first volume,
 whereas

omission of it, the book will be well reconciled; whereas the adoption and continuance of it evidently tend to make Sir Matthew Hale contradict himself.

Sir Michael Foster, has also been relied on as an authority, which directly favours in its greatest latitude, the doctrine as contended for, "that the procurer of treason shall not be put to answer, until the person who actually committed the fact be first convicted."—Let us therefore enquire how far those principles laid down by Foster, as the rule which should govern the discretion of the court upon the trials of derivative offenders, may be said really to support that doctrine? And I confess it appears to me, that the rule as laid down by him, does not, and never was intended to apply to the case of a *treason*

whereas this sentence is taken out of the 23th chapter of the second volume; I think from what has been above observed, it may fairly be concluded to be an error. Vid. preface to Hale's Pleas of the Crown.

treason procured, and in consequence of that procurement *actually committed*. The cases which by that sensible and judicious author are considered, as those to which the rule he explains, ought to be applied, are two only: First, when a person encourages and advises another to commit a fact which would be high treason, (but not within the 25th Edw. 3,) and the other person *forbears* to commit it; and Secondly, in the case of assistance and protection supposed to be given to a traitor *after the fact*, the party knowingly affording such protection, and the treason *being in fact committed*.—A little attention to the *method* of Sir Michael Foster, and to those cases which are stated by him in order to illustrate the principles he is contending for, will, I think, exhibit his ideas in such a point of view, as that he cannot be misunderstood.—In that particular discourse in which he treats of accomplices in treason, and of persons present, aiding and abetting in felony, he

he considers “ * Whether that equitable
 “ rule, which in cases of felony, governs
 “ the trial of the accessaries before and
 “ after the fact, should by parity of rea-
 “ son, be extended to treasonable actions
 “ of a similar nature, i. e. to such as are
 “ of the derivative kind, and though in
 “ the language of the law styled principal
 “ treasons, yet partaking of the nature
 “ of mere *accessorial offences*.” In con-
 sidering those cases in which, though the
 offender in the final issue of the prosecu-
 tion, may be considered as a principal
 in treason, yet during the intermediate
 steps towards his conviction, he ought,
 from a principle of natural justice, to be
 considered merely as in the nature of an
 accessory before or after the fact, he states
 some cases by way of illustration as fol-
 low : “ † For instance, A. adviseth B.
 “ to counterfeit the king’s coin or seals,

* Foster, fo. 343.

† Ibid, 342.

" or indeed to commit any of the offences
 " declared treason by 25th Edw. 3; and
 " furnisheth him with means for that pur-
 " pose; (that species of treason which in
 " judgment of law falleth within the
 " class of compassing the death of the
 " King, Queen or Prince, always ex-
 " cepted.) If B. in consequence of this
 " advice and encouragement, doth the
 " fact, A. is a *principal* in the treason.
 " For such advice and assistance in the
 " case of felony, would have made him
 " an accessory before the fact; and in
 " high treason there are no accessaries,
 " all are principals. But if B. forbearth
 " to commit the fact to which he is in-
 " cited, A. cannot be a traitor merely on
 " account of this advice and encourage-
 " ment, though his behaviour hath been
 " highly criminal. For bare advice or
 " incitement, how wicked soever, unless
 " in the cases already excepted, will not
 " bring a man within the statute, where
 " no treason hath been committed in conse-
 " quence

" quence of it.—So in the case of assistants
 " or protection supposed to be given to a
 " traitor *after the fact*, the party know-
 " ingly affording such protection, if the
 " treason *hath been in fact committed*, will
 " be a principal in treason, for the rea-
 " sons already mentioned. *But* if a per-
 " son lying probably under a suspicion of
 " guilt, conscious of his own innocence,
 " should think it advisable to withdraw
 " and patiently to wait the issue of things
 " when the storm which gathereth round
 " him shall be blown over; the party
 " who received and harboured him dur-
 " ing his retreat, cannot be a traitor for
 " so doing, provided the conduct of his
 " friend shall appear upon examination
 " to have been blameless." These are the
 only two kinds of cases which that learn-
 ed author has thought proper to apply
 the rule to; for all the other cases recited
 in the chapter, are cases of "rescuers,
 persons who suffer those committed to
 prison for treason, to escape, receivers, &c."

all

all of which are cases of treason committed by some act *ex post facto*.—With respect to the first case, it cannot by any possible analogy, be said to apply to the case of Mr. Fitzgerald, for in that case a treason was acknowledged *to be committed*, and as to the second kind of cases, I trust it has already sufficiently appeared, that the ground upon which it is contended that the rule ought to apply to them, does not at all apply to those cases, in which the party is guilty of treason as an offender *a parte ante*.—But perhaps it will be said, “That in the opinion of Sir Michael Foster, nothing short of the conviction of the principal offender, should, upon the trial of the procurer, be admitted as evidence of the fact *having been committed*,” and that thus his reasoning may extend to all cases of offenders in treason *a parte ante*.—Although there is no reason whatsoever to presume that such was the opinion of that great man, yet even supposing that it was his opinion, how far
 15 would

would it be maintainable upon solid, legal principles?—We have already seen, that the procurer of a treason is guilty of having *committed* the treason; and it has already appeared, that when the jury find the substance of the indictment, the *manner* shall be supplied by necessary *intendment*.—But in order to remove every doubt which may possibly arise, as to that latitude in which the rule laid down by Foster ought to be applied, and to convince my reader, that the application of it was intended by him to be extended to those two cases *only* abovementioned, I shall subjoin one remark more of that satisfactory writer, which I trust will be decisive.—After having gone at large into the several cases of traitors *ex post facto*, to which, as he conceived, the rule ought to apply, he concludes (speaking of Lord Hale) by saying, “* The same learned
 “ author, in other parts of his work,
 L “ argueth

* Foster, 346.

"argueth to the purpose, for which I
 "have already cited him; and applieth
 "the same rule of equity to the case of a
 "person indicted for contriving, abetting,
 "aiding, or consenting to treason, which
 "*happeneth never to have been carried into*
 "*execution.*"—So that it appears, the doc-
 trine of Hale, as to those whom he calls
 offenders in treason *a parte ante*, was con-
 sidered by Sir Michael Foster as extend-
 ing *only* to those cases where it did not
 appear that any treason *had been in fact*
committed.

Should any doubt now remain in the
 mind of my reader, with respect to what
 the rule of law ought to be, in the pro-
 secution of offenders *a parte ante* in trea-
 son, I think it will be satisfactorily re-
 moved, by the following *express* autho-
 rity, upon the point under consideration.
 Serjeant Hawkins (who is confessedly the
 highest authority in criminal law) has
 given us his *express* sentiments upon this
 subject,

subject, and by an unequivocal and *certain* opinion, has removed even the possibility of a doubt as to his meaning. In treating of principals and accessaries, he says, “ * It seems to have been always
 “ an uncontrovertible maxim, that there
 “ can be no accessaries in high treason or
 “ trespass. Also it seems to have been al-
 “ ways agreed, That whatsoever will
 “ make a man an accessary before in fe-
 “ lony, will make him a principal in
 “ high treason and trespass; as battery,
 “ riot, rout, forcible entry, and even in
 “ forgery and petit larceny. And there-
 “ fore, wherever a man *commands* another
 “ to commit a trespass, *who afterwards*
 “ *commits it in pursuance of such command,*
 “ he seems by necessary consequence to
 “ be as guilty of it, *as if he had done it*
 “ *himself*; from whence it follows, that
 “ being in judgment of law a principal of-
 “ fender;”

L. 2

* 2 Hawk. P. C. ch. 29. sect. 2. fo. 311. Br. tit. Premunire, pl. 4. 1 Lev. 124. Vin. Abr. tit. Accessary, let. C.

“*fender*, he may be tried and found
 “*guilty, before any trial of the person who*
 “*actually did the fact.*”—Should the con-
 struction which I have above contend-
 ed for, be given to the writings of Sir
 Matthew Hale and Sir Michael Foster,
 the passage just recited from Hawkins,
 will be found to correspond with them
 most accurately; he points, like them,
 to those cases in which *the fact has been*
committed, and seems by this distinction,
 to have established a general consistency
 of opinion upon this subject.

I shall now consider the case of Mr.
 Fitzgerald, as it appears under all its spe-
 cial circumstances. And First, admitting
 that the principles already contended for,
 are not law, but that on the contrary, it is
 an established doctrine at this day, “That
 the court ought to exercise its discretion,
 by applying the rule as contended for, to
 all cases of offenders in treason *a parte*
ante: I shall endeavour to shew that
 there

there were circumstances in Mr. Fitzgerald's case, which ought to have been decisive with the court, in refusing the rule as applied for.—I shall secondly adduce instances of persons, who standing in the same circumstances with that unfortunate gentleman, have been tried and convicted precisely in the same manner.

George Robert Fitzgerald, Esq; was * indicted for that he had "provoked, "stirred up, and procured Andrew Craig, "and others, to slay and murder one Patrick Randall M'Donnell. The indictment also stated, that the said Andrew "Craig, and others, by the procurement "of the said George Robert Fitzgerald, "did slay and murder the said Patrick "Randall M'Donnell."—(There was also another indictment against Mr. Fitzgerald, for procuring the murder of a Mr. Hipson, which stated in like manner, that

L 3

Mr.

* Vide Appendix, No. 1, 2.

Mr. Hipson was murdered by his procurement.) To this indictment he pleaded not guilty.—It was objected on his behalf, that being in the nature of a derivative offender, his trial ought to be postponed, agreeable to the doctrine laid down in Hale and Foster, viz. “That in treason the derivative offender shall not be put to answer, until the principal be first convicted. This objection was overruled, and Mr. Fitzgerald was accordingly tried and convicted before any principal was first attainted.

In this case, it was an uncontroverted fact, that a murder had been committed; the coroner's inquest was conclusive as to that point. Mr. Fitzgerald did not therefore appear to the court in the nature of a person accused as guilty *a parte ante* to a treason, *which had not in fact been committed*; of course any hardship which may be alledged to exist upon the prosecution of offenders in such cases, cannot by any colour

colour of reasoning, be applied to that of Mr. Fitzgerald.—But the circumstance which I presume governed the prosecution in Mr. Fitzgerald's case, a circumstance which has also often governed before, (and which by those who reprobate the proceedings in that case, is not sufficiently attended to) was, * That the person who *actually committed* the treason, *confessed* the fact, and *imprached* his accomplices.—It was obvious therefore, that no *absurdity* could arise should Mr. Fitzgerald be convicted before the person who actually did the fact was tried.—It would have been of no avail, to have objected to the evidence of Craig, (and therefore it was not attempted) for he was clearly a competent witness; the jury were however the judges of his credibility, and his testimony was confirmed by their verdict.

The

* Vide Appendix, No. 5, 6.

* The admission of persons who are participes criminis to be witnesses in cases of treason, has been long established, and will not now be controverted. This point was solemnly decided at a meeting of all the judges, held shortly after the restoration, and has been practised ever since in a variety of cases. Indeed if the law were otherwise, the purposes of justices might, nay would, on many occasions, be totally prevented.

Nor are there cases wanting in the books, in which offenders have been precisely circumstanced as Mr. Fitzgerald, and their prosecutions conducted in the very same way. “† Two men were indicted for making false money; one of them acknowledged the treason, and “ became

* 1 H. P. C. fo. 301. et seq. Kely. 17. St. Tr. vol. 1, fo. 96, 696, 697, 723. vol. 2. fo. 334, 501. vol. 3. fo. 161, 217. et seq. 595, 668, 669, vol. 4. fo. 12, 33. 2 Hawk. P. C. ch. 46. sect. 18.

† Mich. 19 H. 6. fo. 47. pl. 103.

“became approver, the other pleaded
 “not guilty. And the jury found him
 “guilty of *consenting* to the making of
 “false money, and he was convicted ac-
 “cordingly.”—* So in the case of Tonge,
 Phillips, and others, the accomplices were
 the witnesses, and the prisoners were ac-
 cordingly found guilty.

It appears therefore, that the discretion
 of the court was wisely directed in the
 prosecution of Mr. Fitzgerald; there were
 circumstances in his case, which, had the
 rule contended for been general, were
 sufficient to except him from the favour-
 able application of it.

Let us now enquire how far the deter-
 mination in the case of Foy, has strength-
 ened the objection relied on in Mr. Fitz-
 gerald's case, and how far it may be said
 to militate with the decision of the court
 on

on that point, or to oppugn these principles which have been already advanced in the former pages of this treatise.

James Foy, at the Spring Assizes for the county of Mayo, 1786, had been indicted for traitorously, and feloniously being present, aiding, abetting, comforting, and assisting Andrew Craig, and divers other persons, to flee and murder Patrick Randall M'Donnell, Esq.—To this indictment he pleaded not guilty, and was at an adjournment of the same assizes, afterwards tried and acquitted.

At the last Summer Assizes for the said county, Foy was again * indicted for traitorously and feloniously provoking, stirring up, and procuring the said Craig to flee and murder Mr. M'Donnell.—To this indictment Foy pleaded autrefois acquit. To which the crown replied, that the

* Vide Appendix, No. 3.

the offence of which he is now indicted is not the same offence of which he was before acquitted, and the prisoner having rejoined that it was; the crown thereupon joined issue, which after being solemnly argued, was found for the prisoner.

It has been generally imagined that by this decision in the case of Foy, the judgment in the case of Mr. Fitzgerald is indirectly reprobated. A moment's reflection will be perhaps sufficient to convince every dispassionate mind, that the determination in the case of Foy, is rather a confirmation of the principles and rule observed in the attainder of Mr. Fitzgerald.—It is found in Foy's case, that the procuring a murder to be committed, and the aiding and assisting to commit a murder, are the same offence, i. e. in other words, that the commission of a murder, and the procurement of it, are one and the same offence; so that the doctrine

doctrine already laid down, is completely established by the decision in Foy's case. For if they are the same offence, the offenders may be tried at any time as they first come in.—Thus the seeming contradiction is satisfactorily reconciled.

APPENDIX.

A P P E N D I X.

COPY OF THE

I N D I C T M E N T S

AGAINST

GEORGE ROBERT FITZGERALD, Esq.

No. I. FIRST INDICTMENT.

County of Mayo, }
to wit. } T H E Jurors for our
their oath present, and say, that George Lord the King upon
Robert Fitzgerald, late of Turlogh, Esq; not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the 21st of February, in the twenty-sixth year of the reign of
† A our

A P P E N D I X

our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, defender of the faith, and so forth, at Turlogh, in said county of Mayo aforesaid, of his malice prepened, wilfully, traitorously and feloniously did ~~provoke, stir up and procure~~ Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon and Patrick Doring, otherwise Downey, and divers other persons at present unknown, to ~~slee~~ and murder one Patrick Randall Mc-Donnell, who was then and there a subject of our said lord the King, which said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Doring, otherwise Downey, and divers other persons, at present unknown, on the day aforesaid, in the year aforesaid, with force and arms, to wit, at Kilnecarra in the county aforesaid, in and upon the said Patrick Randall Mc-Donnell, in the peace of God and our said lord

lord the King, then and there being wilfully, traitorously and feloniously, and of their malice pre-pensed, did make an assault, and certain guns of the value of five shillings each, and every of the said guns, being then and there charged with gunpowder and leaden bullets, which guns the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in their right hands respectively had and held against and upon the said Patrick Randall Mc. Donnell, wilfully, traitorously and feloniously and of their malice pre-pensed, did shoot and discharge, and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, with the leaden bullets aforesaid, out of the guns aforesaid, then and there by force of the gun-

A 2 powder

powder aforesaid, shot and sent forth as aforesaid, the aforesaid Patrick Randall Mc. Donnell, wilfully, traitorously and feloniously, and of their malice prepensed, and by the aforesaid, *provocation, stirring up and procurement*, then and there did strike, penetrate and wound, giving to the said Patrick Randall Mc. Donnell, with the leaden bullets aforesaid, so as aforesaid, shot, discharged, and sent forth out of the guns aforesaid, by the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfson, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in and upon the said body of the said Patrick Randall Mc. Donnell, several mortal wounds of the depth of four inches and of the breadth of half an inch, and of which mortal wounds the aforesaid Patrick Randall Mc. Donnell, then and there instantly died; and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny,
John

John Burney, William Robinson, John Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, the said Patrick Randall Mc. Donnell, then and there in manner and form aforesaid, *wilfully, traitorously, and feloniously, and of their malice prepensed, did flee and murder,* and the said George Robert Fitzgerald and another, then and there in manner and form aforesaid, *wilfully, traitorously and feloniously, and of their malice prepensed, did provoke, stir up and procure* the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present to the jurors aforesaid unknown, *to flee and murder* in manner and form aforesaid, the said Patrick Randall Mc. Donnell, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said lord the King, his crown and dignity, and against the form of the statute in that case made and provided.

No. II. SECOND INDICTMENT.

County of Mayo, } THAT he with another,
to wit. } not having the fear of God
before his eyes, but being moved and seduced
by the instigation of the devil, on the 21st of
February, in the twenty-sixth year of the reign
of our Sovereign Lord George the Third, now
King of Great Britain, France and Ireland,
and so forth, at Gurtnefulla aforesaid, of their
malice prepenfed, did wilfully, traitorously,
and feloniously *provoke, stir up and procure* An-
drew Creagh, otherwise Craig, James Foy,
otherwise Sladeen, Humphrey George, Wil-
liam Kelly, John Fulton, William Fulton, Da-
vid Simpson, otherwise Saltry, Archibald New-
ing, Michael Bruen, John Chapman, John Re-
hanny, John Burney, William Robinson, John
Cox, Philip Cox, James Masterfon, and Pa-
trick Dorning, otherwise Downey, and divers
other persons at present unknown to *flee and*
murder one Charles Hipfon, who was then and
there a subject of our said Lord the King, which
said Andrew Creagh, otherwise Craig, James
Foy, otherwise Sladeen, Humphrey George,
William Kelly, John Fulton, William Fulton,
David

David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Dorning, otherwise Downey, and divers other persons at present unknown, on the day aforesaid, in the year aforesaid, with force and arms, to wit, at Gurtnefulla in the county aforesaid, in and upon the said Charles Hipson, in the peace of God and our said lord the King, then and there being, *wilfully, traitorously and feloniously, and of their malice prepensed*, did make an assault, and certain guns of the value of five shillings each, and every of the said guns being then and there charged with gunpowder and leaden bullets, which guns the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in their right hands, respectively had and held against, and upon the said Charles Hipson, *wilfully, traitorously, and feloniously* and of their malice prepensed, did shoot and discharge, and the said Andrew Creagh, otherwise

wife Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, with the leaden bullets aforesaid, out of the guns aforesaid, then and there by force of the gunpowder aforesaid, shot and sent forth as aforesaid, the aforesaid Charles Hipson, wilfully, traitorously and feloniously, and of their malice prepensed, and by the aforesaid *provocation, stirring up and procurement*, then and there did strike, penetrate and wound, giving to the said Charles Hipson, with the leaden bullets aforesaid, so as aforesaid shot, discharged and sent forth out of the guns aforesaid, by the said Andrew Creagh, otherwise Craig, James Fox, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, in and upon the body of the said Charles Hipson,

Hipson, several mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforesaid Charles Hipson then and there instantly died; and the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons at present unknown, the said Charles Hipson, then and there in manner and form aforesaid, *wilfully, traitorously, and feloniously, and of their malice prepensed did flee and murder*, and the said George Robert Fitzgerald and another, then and there in manner and form aforesaid, *wilfully, traitorously and feloniously, and of their malice prepensed, did provoke, stir up and procure* the said Andrew Creagh, otherwise Craig, James Foy, otherwise Sladeen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons

persons at present unknown, *to flee and murder* in manner and form aforesaid, the said Charles Hipson, then and there being a subject of our said lord the King, within this land of Ireland, contrary to the peace of our said Lord the King, his crown and dignity, and against the form of the statute in that case made and provided.

Copy of the Pleadings, in the case of the
KING and FOY.

No. III. I N D I C T M E N T.

County of Mayo, } THE Jurors for our
to wit. } Lord the King upon their
oath present and say, that James Foy, other-
wise Sladeen, late of Turlogh, in the county of
Mayo, Yeoman, not having the fear of God be-
fore his eyes, but being moved and seduced by
the instigation of the devil, on the 21st day of
February, in the 26th year of the reign of our
sovereign Lord George the Third, now King
of Great Britain, France and Ireland, defender
of the Faith, and so forth, at Turlogh, afore-
said, in the said county of Mayo, did of his ma-
lice premeditated, wilfully, traitorously, and selo-
niously provoke, stir up, and procure Andrew
Creagh,

Creagh; otherwise Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Patrick Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforefaid unknown, to flee and murder one Patrick Randall Mc. Donnell, who was then and there a subject of our said lord the King, within this land of Ireland.

And the Jurors aforefaid, upon their oath aforefaid, further present and say, that the said Andrew Creagh, otherwise Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforefaid unknown, on the day aforefaid, in the year aforefaid, with force and arms, to wit, at Kilnecarra, in the county aforefaid, in and upon the said Patrick Randall Mc. Donnell, in the peace of God, and of our said lord the King, then and there being, wilfully, traitorously, and feloniously, and of their malice prepenfed,

prepenſed; did make an affault, and certain guns of the value of five ſhillings, each and every of the ſaid guns being, then and there charged with gunpowder and a leaden bullet, which guns they the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwiſe Saltry, Archibald Newing, William Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in their right hands, reſpectively, then and there had and held, againſt and upon the ſaid Patrick Randall Mc. Donnell, wilfully, traitorouſly, and feloniouſly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up and procurement of the ſaid James Foy, otherwiſe Sladeen, did ſhoot and diſcharge, and the ſaid Andrew Creagh, otherwiſe Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, with the leaden bullets aforeſaid, out of the guns aforeſaid, then and there, by force of the gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid Patrick

trick Randall Mc. Donnell, wilfully, traitorously, and feloniously, and of their malice prepensed, and by the aforesaid provocation, stirring up, and procurement of the said James Foy, otherwise Sladeen, then and there did strike, penetrate and wound, giving to the said Patrick Randall Mc. Donnell, then and there, with the leaden bullets aforesaid, so as aforesaid shot, discharged, and sent forth, out of the guns aforesaid, by the said Andrew Creagh, otherwise Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, in and upon the body of him the said Patrick Randall Mc. Donnell, several mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforesaid Patrick Randall Mc. Donnell then and there instantly died.

And the Jurors aforesaid, upon their oath aforesaid, do say, that Andrew Creagh, otherwise Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney,

Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, the said Patrick Randall Mc. Donnell, then and there, in manner and form aforesaid, wilfully, traitorously, and feloniously, and of their malice prepensed, did flee and murder.

And so the Jurors aforesaid, upon their oath aforesaid do say, that the said James Foy, otherwise Sladeen, then and there, in manner and form aforesaid, wilfully, traitorously, and feloniously, and of their malice prepensed, did provoke, stir up, and procure the said Andrew Greagh, otherwise Craig, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpson, otherwise Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinson, John Cox, Philip Cox, James Masterfon, and Patrick Dorning, otherwise Downey, and divers other persons, at present to the Jurors aforesaid unknown, to flee and murder, in manner and form aforesaid, the said Patrick Randall Mc. Donnell, then and there being a subject of our said Lord the King, within this land of Ireland, contrary to the peace of our said lord the King, his crown and dignity, and against the form of the statute in that case made and provided.

No. IV. P L E A.

No. IV. P L E A.

The King
 against
 James Foy, other-
 wife Sladeen. } AND the said James **PLEA,**
 Foy, by the aforefaid *Autorfois*
 bill of indictment, named *acquit.*
 James Foy, otherwise Sla-
 deen, in his own proper person comes, and ha-
 ving heard the indictment aforefaid read, and
 protesting that he is not guilty of the premises,
 charged in the said indictment for plea, never-
 theless saith, that he ought not to be compelled
 to answer to the said indictment, because he saith,
 that he hath heretofore been tried and acquitted
 of the wilful, traiterous and felonious killing of
 the said Patrick Randall Mc. Donnell, for that
 at the general assizes and general gaol delivery
 held at Castlebar, in and for the county of
 Mayo, the 10th day of April, in the twenty-
 sixth year of the reign of our sovereign lord
 George the third, of Great Britain, and so
 forth, before the right honourable Barry Yel-
 erton, chief baron of his majesty's Court of
 Exchequer, in Ireland, and the honourable
 Sir Samuel Bradstreet, baronet, one of the jus-
 tices of his majesty's court of Chief Place, in
 Ireland, justices and commissioners of our said
 lord

RECORD.

COMMISSION.

lord the King, and the honourable Richard Power, Esq; second baron of his majesty's Court of Exchequer in Ireland, their associate assigned to hear and determine all and singular treasons, murders, man-slaughters, burnings, robberies, burglaries, felonies, unlawful assemblies, extortions, oppressions transgressions, contempts, evil-doings, offences, and causes whatsoever, and also from time to time to deliver the gaol of our said lord the king for the county of Mayo of all prisoners and malefactors therein, being by virtue of a commission of our said lord the King, under his great seal of his kingdom of Ireland, bearing date at Dublin, the 20th day of February, in the 26th year of the reign of our said lord the king, by the oath of twelve true and lawful men of the county of Mayo, whose names here follow, that is to say, Sir Neal O'Donnell, baronet, the right honourable James Cusse, the honourable Henry Browne, Thomas Samuel Lindsay, Charles Costello, John Bingham, Thomas Lindsay, senior, Thomas Lindsay, junior, Francis Knox, Arthur French, George Miller, Christopher Bowen, William Rutledge, Hugh O'Donnell, James Browne, Thomas Ormsby, John Ormsby, Richard Blake, Edward Browne, William Brabazon, George O'Maley, William Orme, and James O'Donnell, when said jurors being then and there sworn

GRAND JURY.

Sworn before the said justices and commissioners, to enquire on behalf of our said lord the king, and the body of the said county, of all such matters, articles and things as were then and there enjoined them, did present and say, that George Robert Fitzgerald, late of Turlogh, in the county of Mayo, Esq; Timothy Brecknock, late of the same place, gent. Andrew Creagh, otherwise Craig, late of the same, yeoman, James Foy, late of the same, yeoman, John Fulton, late of the same, weaver, Charles King, late of the same, yeoman, John King, late of the same, yeoman, Abel Fulton, late of the same, yeoman, John Murphy, late of the same, yeoman, James Masterfon, late of the same, yeoman, John Cox, late of the same, yeoman, David Saltry, otherwise Simpson, late of the same, yeoman, Philip Cox, late of the same yeoman, Richy Law, late of the same, yeoman, John Huston, late of the same, yeoman, James Foy, otherwise Sladeen, late of the same, yeoman, William Fulton, late of the same, yeoman, Samuel Stephenson, late of the same, yeoman, John M'Mullen, late of the same, yeoman, William Kelly, late of the same, yeoman, William and Robert Logan, late of the same, yeomen, Wallace Kelly, late of the same, yeoman, James M'Cullogh, late of the same, yeoman, John Chambers, late of the same, yeoman,

INDICT-
MENT.

+ B

John

John Chapman, late of the same, yeoman, Archibald Newen, late of the same, yeoman, John Bernice, late of the same, yeoman, Humphrey George, late of the same, yeoman, Michael Bruen, late of the same, yeoman, John Rehan-ny, late of the same, yeoman, William Robinson, late of the same, yeoman, Patrick Dorning, otherwise Downey, late of the same, yeoman, with divers other persons, to the Jurors at present unknown, not having the fear of God before their eyes, but being moved and seduced by the instigation of the devil, on the twenty-first day of February, in the twenty-sixth year of the reign of our sovereign lord George the third, now King of Great Britain, France, and Ireland, defender of the faith, and so forth, with force and arms, at Kilnecarra, in the county afore said, in and upon Patrick Randall M'Donnell, in the peace of God, and a subject of our lord the king, within this land of Ireland, then and there being, wilfully, traitorously, feloniously, and of their malice prepensed, did make an assault, and that the said Andrew Craig, a certain pistol of the value of five shillings, then and there charged with gunpowder and one leaden bullet, which pistol he the said Andrew Craig, in his right-hand, then and there had and held against, and upon the said Patrick Randall M'Donnell, then and there wilfully, traitorously,

traitorously, and of their malice prepenſed, did ſhoot and diſcharge, and that the ſaid Andrew Craig, with the leaden bullet aforeſaid, out of the piſtol aforeſaid, then and there by force of the gunpowder aforeſaid, ſhot and ſent forth, as aforeſaid, the aforeſaid Patrick Randall M'Donnell, in and upon the left breaſt of him the ſaid Patrick Randall M'Donnell, then and there with the leaden bullet aforeſaid, out of the piſtol aforeſaid, by the ſaid Andrew Craig, as aforeſaid, ſhot, diſcharged, and ſent forth, wilfully, traitorouſly, feloniouſly, and of his malice prepenſed, did ſtrike, penetrate and wound, giving to the ſaid Patrick Randall M'Donnell, then and there, with the leaden bullet aforeſaid, ſo as aforeſaid ſhot, diſcharged and ſent forth out of the piſtol aforeſaid, by the ſaid Andrew Craig, in and upon the left breaſt of him the ſaid Patrick Randall M'Donnell, one mortal wound of the depth of four inches, and of the breadth of half an inch, of which ſaid mortal wound the aforeſaid Patrick Randall M'Donnell, then and there inſtantly died; and that the aforeſaid George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy Law, John Huſton, James Foy, otherwiſe Sladeen,

William Fulton, Samuel Stephenson, John M'Mullen, William Kelly, Patrick Dorníng, William Logan, Robert Logan, William Fulton, Wallace Kelly, James McCullogh, John Chambers, John Chapman, Archibald Newen, and John Bernée, then and there wilfully, traitorously, feloniously, and of their malice prepensed, were present, aiding, helping, abetting, comforting, assisting and maintaining the said Andrew Craig, in the treason and murder aforesaid, in manner and form aforesaid, to do and commit. And so the jurors aforesaid do say, that the said Andrew Craig, George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Masterfon, John Cox, David Saltry, Philip Cox, Richy Law, John Huston, James Foy, otherwise Sladeen, William Fulton, Samuel Stephenson, John M'Mullen, William Kelly, Patrick Dorníng, William Logan, Robert Logan, William Fulton, John Chambers, John Chapman, Archibald Newen, and John Bernée, the said Patrick Randall McDonnell, then and there in manner and form aforesaid, wilfully, traitorously, feloniously, and of their malice prepensed, did flee and murder, against the peace of our said lord the king, his crown and dignity, and also against the form of the statute in such case made

made and provided. And afterwards, that is to say, at the said general assizes and general gaol-delivery held at Castlebar aforesaid, on the tenth day of April aforesaid, in the twenty-sixth year of the reign of our said lord the king aforesaid, the aforesaid James Foy, otherwise Sladeen, came in his proper person under the custody of the honourable Dennis Browne, sheriff of the said county, to whose custody the aforesaid James Foy, otherwise Sladeen, for the cause aforesaid was before that time committed, and further concerning the premisses in the said indictment above specified and charged, he the said James Foy, by the said indictment called James Foy, otherwise Sladeen, being then and there asked how he would acquit himself thereof, the said James Foy then and there said he was not guilty thereof; and concerning this for good and evil, he the said James Foy, by the said indictment called James Foy, otherwise Sladeen, did then and there put himself upon his country, and the right honourable John Fitzgibbon, the Attorney-General of our said lord the king, to the county of Mayo, who for our said lord the king in this behalf prosecuted, did the like, and so forth; and it was commanded by the said justices and commissioners, that the sheriff of the county of Mayo aforesaid, should cause to come before the justices and

ARRAIGN-
MENT.PLEA—
not Guilty.

ISSUE

VENIRE. and commissioners aforesaid, twelve jurors and so forth, by whom, and so forth, and who were of no affinity to the said James Foy, otherwise Sladeen, and so forth, to recognize upon their oaths whether the said James Foy, otherwise Sladeen, was guilty of the said treason and murder of the said Patrick Randall M'Donnell, in the said indictment supposed to be done or not. And that the jurors of the said jury, being then and there impannelled, and returned, that is to say, Thomas Samuel Lindsay, Peter Lynch, Thomas Lyndsey, jun. John Bingham, William Ously, Bartholomew French, Arthur Lindsey, Thomas Ormsby, Martin Kirwan, Edmund Gildea, Joseph Lambert, and Courtney Kenny, being called, came; who being chosen, tried, and sworn to say the truth, of and concerning the premises aforesaid, in the said indictment aforesaid, above-specified, upon their oaths did say, that the said James Foy, by the said indictment, called James Foy, otherwise Sladeen, was not guilty of the treason and murder aforesaid, in the indictment aforesaid specified in manner and form as was supposed against him, and that he did not fly for the same. And it was therefore considered by the said justices and commissioners, that the said James Foy, otherwise Sladeen, of the premises aforesaid, in the indictment aforesaid above specified, be discharged

PETIT JURY.

VERDICT
—not
Guilty.

**JUDG-
MENT.**

discharged and go without delay, as by the record of the same proceedings before the same justices and commissioners more manifestly appears. And the said James Foy, otherwise Sladeen, further saith, that the murder and offence in the bill of indictment last above mentioned on which the said James Foy, otherwise Sladeen, was by the jurors of the said jury acquitted in manner and form aforesaid, is one and the same murder and offence for which bill of indictment on which the said James Foy, otherwise Sladeen, is now arraigned was found, and not a different murder or offence; and that the said James Foy, otherwise Sladeen, in the said bill of indictment named, and the said James Foy named in the said bill of indictment on which he is now arraigned, is one and the same person, and not a different person; and that by the laws now in force in these realms the said James Foy, ought not to be put on his trial again for the same murder and offence. Wherefore the said James Foy prays the judgment of the court, and that he may go discharged from the said indictment on which he is now arraigned, and so forth.

“ And the said right honourable John Fitzgibbon, who, for our lord the king on this behalf prosecutes, says, that the treason, murder and offence in the indictment last above mentioned,

PLEA.
Aiterfois
acquitt.

REPLI-
CATION.

“mentioned, on which the said James Foy,
 “otherwise Sladeen, was by the jurors of the
 “said jury acquitted in manner and form afore-
 “said, is not one and the same treason, murder
 “and offence for which the bill of indictment
 “on which the said James Foy, otherwise Sla-
 “deen, is now arraigned and found:—And this
 “he is ready to verify.

REJOIN-
 DER.

“And the said James Foy, otherwise Sla-
 “deen, says, that the treason, murder and of-
 “fence in the said indictment, of which the
 “said James Foy, was heretofore by the ju-
 “rors of the said jury acquitted in manner and
 “form aforesaid, is one and the same treason,
 “murder and offence, for which the said bill
 “of indictment on which the said James Foy,
 “otherwise Sladeen, is now arraigned and
 “found, and this he prays may be enquired of
 “by the country.”

SIMILI-
 TER.

And issue was then joined, “and the right
 “honourable John Fitzgibbon, his majesty’s
 “attorney general likewise.” And a jury was
 “then sworn to try this issue.

The

No. V.

The Confession of ANDREW CRAIG, taken by
the Rev. Thomas Ellison, one of his Ma-
jesty's Justices of the Peace for said County.

County of Mayo, } WHO being duly sworn
to wit. } on the Holy Evangelists
and examined, saith, that George Robert
Fitzgerald, of Turlogh, in said county, Esq;
ordered informant to take a pair of hunters,
and to bring John Fulton with him to the
house of Patrick Randall Mc. Donnell, of
Liberty-Hall, Esq; and to point out the said
Mc. Donnell to the said Fulton, with positive
directions by the said Fitzgerald, to informant,
to order the said Fulton to fire in at the said
Mc. Donnell, through his window, and also to
take aim at the centre of his body, near his left
side, to make sure of his mark, and if the said
Fulton could not take the said Mc. Donnell's
life, with the first shot, to discharge a case of
pistols at him, through the said window, and at
the same time desired him to be steady; and
saith, that according to said Fitzgerald's direc-
tions, informant was obliged to go with the
said Fulton, to the said Mc. Donnell's house,
and when they came within one hundred yards
of

of said house, the said Fulton, according to the said Fitzgerald's orders so given, did wickedly, wantonly and feloniously, fire a gun into the window of the said Mc. Donnell's house, with an intent to take his life, and informant saith, that in some short time after the said George Robert Fitzgerald ordered him to bring the said John Fulton and John Mullin with him, and place them in a house near the high road, on the lands of Keelagues, and to make two spike-holes through the gable end of said house, and wait the coming of the said Mc. Donnell, with positive directions to the said Fulton and Mullin, to fire at and kill the said Mc. Donnell, John Gallagher and Andrew Gallagher, if they should accompany the said Mc. Donnell, also ordering them to fire their two long guns first, and their two short guns after, to make sure of the covey, that after so doing they could protect themselves with their pistols, and informant saith, that the said Fulton and Mullin lay in wait in said house two days and two nights, and returned to the said Fitzgerald, and told him they could do no good; that the said Mc. Donnell, John Gallagher, or Andrew Gallagher, did not pass that way, during the time which the said Fitzgerald ordered them to stay; and informant saith, that the said George Robert Fitzgerald ordered him on or about the fifteenth

teenth day of December last, to send the afore-
said John Fulton, John Mullin and John Mur-
phy, to a waste house on the lands of Capa-
ranny, on the estate of the said Fitzgerald;
within one hundred and twenty yards of the
house of the said Patrick Randall Mc. Donnell;
and told the said party, that John Shawner
would send the said Mc. Donnell into said
waste house to them, and positively to shoot
him, and after so doing, to fire a pistol at his
head, to blow his brains out, and informant
saith, as the said Mc. Donnell was walking by
said house, within about twenty-four yards, the
said John Mullin, according to the said Fitzge-
rald's orders, did feloniously fire a gun, loaded
with gunpowder and leaden slugs, at the said
Mc. Donnell, which wounded him desperately
in the calf of the right leg, as said Fulton and
Mullin acknowledged, and informant saith, that
on Monday the twentieth of February last, he
rode out to air one of his master's horses, he was
met by John Shawner, who told informant,
his master wanted him immediately, and the
lads was now at Chancery, and would be pro-
per time to neck them; informant immediately
returned to his master to the house of Turlogh,
where the said Fitzgerald ordered informant to
go, and bring the tenantry to him immediately,
which informant did, and then the said Fitzge-
rald

rald ordered each man some whiskey, which they were pressed to drink, and at the same time giving William Fulton some warrants as informant believes, desiring said Fulton and party to execute them at the peril of their lives, let the consequence be what it would, and saith, that as said party was going from said Fitzgerald, he called informant aside, and ordered him to tell John Fulton and John Mullin, to shoot the said Patrick Randall Mc. Donnell, Andrew Gallagher and Charles Hipson, and not to make a botched job of it, as they had often done before, and that he the said Fitzgerald would go and shoot them himself, but he must stand clear to save their lives, for murdering the said Patrick Randall Mc. Donnell, Andrew Gallagher and Charles Hipson, and said at the same time, if he was to go, he would not make a botched job of it, that he would hit him the said Mc. Donnell, within an inch of the center of his heart, and informant saith, after said orders so given by the said Fitzgerald, they proceeded to the house of the said Mc. Donnell, and entered therein, and feloniously took thereout, seven or eight musquets, value seven pounds sterling, the property of the said Mc. Donnell, which the said Fitzgerald ordered them so to do, after they murdered Mc. Donnell, Gallagher and Hipson, and saith, that in some

some time after, informant returned to the house of Turlogh, aforesaid, where part of said musquets so feloniously taken were deposited in the parlour of the said Fitzgerald, and saith, that some time after, informant received a message from said Fitzgerald, to immediately repair with his party to the house of Bellavary, and that they had the said Mc. Donnell, Gallagher and Hipson, pinned in said house, and saith, that according to said order, at the peril of informant's life, as before charged, would be taken, was obliged to bring said party to said place, where informant found James Foy, otherwise called Sladeen, arranging an armed party, telling them such as would not fire to lay down their arms, and saith, that said party so cautioned by said Foy, fired several shots into the windows of said house of Bellavary, at the said Mc. Donnell, Gallagher and Hipson, without provocation, and immediately William Fulton and several others, burglariously broke into said house, and brought out the said Mc. Donnell, Gallagher and Hipson, which the said Fitzgerald and party brought tied to his house in Turlogh aforesaid, though they often requested at the same time, to be brought before a magistrate, but the said Fitzgerald refused; immediately he called informant aside, and desired he would go towards Mr. Bullinbrooke's with

with the prisoners, and shoot them on the road; but informant refused so to do, and saith, that on the night of said day, said Fitzgerald ordered him to send up the aforesaid John Fulton and John Mullin, to the room in said Fitzgerald's house, where the prisoners were confined to shoot them, and to tell the said Fulton and Mullin they were breaking through the windows, but informant refused; immediately after informant refused to obey said order, he and the said Fitzgerald went into the garden, where they met John Shawner, when the said Fitzgerald gave orders to informant, to have the persons brought immediately, and the said Shawner would shoot the said Patrick Randall Mc. Donnell, and Fulton and Mullin was to shoot Andrew Gallagher and Charles Hipson, but informant refused to obey said order, and at the same time requested that said Gallagher's life should be saved, but said Fitzgerald still persisted and repeatedly cried the covey, the covey, meaning that the said Mc. Donnell, Gallagher and Hipson should be brought out of the said Fitzgerald's house, and shot, and informant saith, that on Tuesday morning, the twenty-first of February last, he went into said Fitzgerald's room to call him out of bed, and when said Fitzgerald came down stairs, desired informant pick a party of supple young men to

go with the prisoners, which informant brought to the hall, where they drank spirits of whiskey to excess, and saith, he was then ordered to draw up said party, to receive the prisoners; which was immediately done, and after so doing, was ordered to remove them above the house; and saith, that said Fitzgerald called him, and said, you have made a pretty job of it, by not consenting to have the prisoners shot last night, and at the same time told informant that the country was up in arms, but he the said Fitzgerald had laid a plan to have them shot like dogs, which plan was to send a man into the Deer-Park, to fire a shot at the party, and that they would imagine it was some of the said Mc. Donnell's men, that was attempting to rescue, and at the same time, that Fulton and Mullin should shoot the said Mc. Donnell and Hipson, and that he would send James Foy to shoot Gallagher, and saith, that said Fitzgerald ordered informant to tell the party, that by an act of parliament pointed out by Timothy Brecknock, that if there was a rescue attempted, to be sure to shoot the prisoners, and saith, according to said Fitzgerald's orders, he called said Fulton and Mullin aside, and told them their masters orders to shoot the prisoners, and not make a botched job of it, for if they were not shot this day, he the said Fitzgerald must quit

quit the country; and saith, that after said Fitzgerald's giving said orders, the said Gallagher and Hipson were tied together, and Patrick Randall Mc. Donnell, mounted on his mare, led by John Murphy; the said party had gone about a quarter of a mile from said house of Turlogh, in a lonesome part of the road, between the Deer Park gate of Turlogh, and James Foy's house, when the man sent by the said Fitzgerald, fired on the party, and immediately after said shot, John Mullin fired at Charles Hipson, and killed him on the spot, and saith, at the same time, John Fulton and some others levelled their pieces and fired at the said Patrick Randall Mc. Donnell, by which shots the said Mc. Donnell's arms were broke, as informant verily believes, and saith, that after said shots so feloniously fired by the order and particular direction of the said Fitzgerald, that said Mc. Donnell's mare took flight, on which said party pursued, and overtook him at the bridge of Kilnecarra, in appearance lying dead, and informant saith, that he levelled and fired at said Mc. Donnell, which he believes hit him about the legs or knees, and saith, said party immediately after returned to the house of Turlogh, where they found Andrew Gallagher at the hall-door, when said Fitzgerald came to informant, and told him he had made a pretty

pretty job of it, to leave the said Gallagher alive, and that he would hang us all, and immediately ordered informant to bring out said Fulton and Mullin, and shoot the said Gallagher, and saith, shortly after came with the army, which prevented the said Fitzgerald's premeditated murder on the said Gallagher, and saith, that were it not for the army so brought, the said magistrate or any other person which was with him, along with the said Gallagher, would be murdered by the said Fitzgerald and his party, to the best of informant's belief, and former knowledge of the said George Robert Fitzgerald, and further saith not.

Signed,

ANDREW CRAIG.

Sworn before the Rev. Thomas Ellifson,
25th day of April 1786.

(A true Copy.)

No. VI. By GEORGE O'MALLEY, of Snugborough, Esq; one of his Majesty's justices of the peace for said county.

County of Mayo, } WILLIAM KELLY,
to wit, } of Turlogh, in said county, cordwainer, willingly and without compulsion, confessed before me, that John M'Mullin,
† C servant

servant to George Robert Fitzgerald, declared to him, that he gave Mr. M'Donnell a bone to pick, by firing a shot at him out of a house on the lands of Capperranny, about two months since; and John Fulton, another servant of said Fitzgerald's, at the same time confirmed what the said M'Mullin said, by saying by God he did, and that he heard that John Murphy was one of the party who was with said M'Mullin when he fired said shot, and saith, that said George Robert Fitzgerald endeavoured to conceal said M'Mullin, said Fulton, and said Murphy, and shelter them from the civil power, and encouraged to brave all threats or endeavours to punish them; and deponent further saith, that said George Robert Fitzgerald sent one James Foy, a steward of his, for them on the morning of the 20th of February instant, to come down to him to the house of Turlogh, and that his master wanted to speak to them, with which William Kelly went with said Foy, and found Mr. Fitzgerald in his own parlour, with a parcel of fire arms, which he believed were charged, and surrounded by a number of people, and said Fitzgerald said to the surrounding people, any of them that objected to take a gun, now to declare it, and said Kelly declared he would take none, to which Fitzgerald replied, very well, Kelly; that then the arms were all taken by different people, and
Fitzgerald

Fitzgerald instructed them that they had three warrants against M'Donnell, and desired them to take him, and if they saw him and could not take him, to fire at him and shoot him, and afterwards gave each man a bumper of spirits and sent them off; and the said Fitzgerald took horse at the same time, and took a different route to gather more people, and met the aforementioned mob at Ballyvary, where they had said M'Donnell, and one Charles Hipson, and Andrew Gallagher, of Castlebar, apothecary, in custody; and when Fitzgerald met them, he gave directions to have the prisoners tied, which was accordingly done by John M'Mullin afore said, and that said Fitzgerald on coming up to said M'Donnell, called him a coward, and said he was glad he had him in custody; and Foy afore said gave said Hipson afore said a slap on his face, and called him out of his name; the prisoners were sent up stairs in Mr. Fitzgerald's house, and left there guarded by two men till about seven o'clock next morning, when the prisoners were sent off with the aforementioned party, having first got directions from Mr. Fitzgerald afore said, to take care of the prisoners, and in case a rescue was attempted, to shoot the prisoners; and this deponent, William Kelly, further saith, that they had not gone a hundred perches, when deponent being foremost of the party, heard a shot
fired

fired behind him, which he believes was fired by one of his own party, as he saw neither man or woman else, or any sort of fire arms, save what the party he belonged to had, on which one of the party cried out, take care of the prisoners; and said John Fulton, John M'Mullen, both aforesaid, and one Andrew Craig, body servant to said Fitzgerald, all three aforesaid, fired much at the same time, with which volley of shots said Hipson, one of the prisoners, fell dead, and said Gallagher was wounded and fell, and it was supposed by deponent's party, that he was dead; that by the same volley said M'Donnell was wounded and cried out murder, and galloped and fell at Kellnacarra bridge, where deponent and his party found him bleeding; and on coming up to him, Andrew Craig aforesaid, cocked his gun, and on deponent's endeavouring to prevent his firing, he cried out he would discharge his gun through his soul if he interfered, on which deponent desisted, and said Craig then fired his gun at said M'Donnell while he lay weltering in his blood, and hit him in some part of his breast and body, of which wound said M'Donnell died in 15 minutes after.

Acknowledged before us, 23d February, 1786.

GEORGE O'MALLEY, } Signed,
CHRIST. BAYNES. } Wm. KELLY.

Ed. J. M.

